No. 7454

United States

Circuit Court of Appeals

For the Ninth Circuit.

ASA B. CUTLER and FRANK W. CUTLER, co-partners doing business under the name of CUTLER MANUFACTURING CO., CUTLER MANUFACTURING COMPANY, INC., an Oregon corporation, FOOD MACHINERY CORPORATION, a Delaware corporation, formerly known as John Bean Manufacturing Company, F. W. CUTLER, Director, General Agent and Attorney in Fact within the State of Oregon for Food Machinery Corporation, and Cutler Manufacturing Co., a division of Food Machinery Corporation,

Appellants,

vs.

FLOYD J. COOK,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States For the District of Oregon.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index

Index Page

NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD:

JAMES G. WILSON and
JOHN F. REILLY,
Platt Building, Portland, Oregon,
for Appellants.

OMAR C. SPENCER,
FLETCHER ROCKWOOD, and
CAREY, HART, SPENCER & McCULLOCH,
Yeon Building, Portland, Oregon,
for Appellee.

In the District Court of the United States for the District of Oregon.

November Term, 1930.

BE IT REMEMBERED, That on the 22nd day of January, 1931, there was duly filed in the District Court of the United States for the District of Oregon, a Transcript of Record on removal from the Circuit of the State of Oregon for Multnomah County, and contained in said Transcript is a Bill of Complaint, in words and figures as follows, to-wit: [4*]

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the Circuit Court of the State of Oregon
for the County of Multnomah.

No. P-2487.

FLOYD J. COOK,

Plaintiff,

vs.

ASA B. CUTLER and F. W. CUTLER, individually and as partners doing business under the name of CUTLER MANUFACTURING CO.; CUTLER MANUFACTURING COMPANY, INC., an Oregon corporation; FOOD MACHINERY CORPORATION, a Delaware corporation, formerly known as the John Bean Manufacturing Co.; F. W. CUTLER, Director, General Agent, and Attorney in Fact within the State of Oregon for Food Machinery Corporation; and CUTLER MANUFACTURING COMPANY, a division of Food Machinery Corporation,

Defendants.

BILL IN EQUITY.

COMES NOW the plaintiff and, as ground for this suit in equity, alleges:

I.

That about the year 1925 plaintiff conceived and commenced construction of a fruit grader and sorter that would accomplish uniformity of sizing and of bin distribution in the packing of fruit; and by the

season of 1926-1927 plaintiff's said fruit grader, as the result of the construction of four or more machines by plaintiff, had come into use as a practical and workable machine.

II.

That on October 25, 1927, plaintiff was granted by the United States of America, letters patent No. 1646951 for his invention, design, plan, and process for the sorting of fruit, known and designated as Cook Fruit Graders and Sorters, used in the packing business; and thereafter and on the 4th day of December, 1928, obtained a reissue of the same, No. 17149.

III.

That at the dates above set forth, and at all times subsequent, the plaintiff was and is the sole owner of the invention, scheme, and plan of construction, use and operation, according to the [5] principle and theory in said patent set forth, of and for Cook Graders.

IV.

That on May 4, 1928, and prior thereto, plaintiff was manufacturing and selling said graders for the packing trade successfully and profitably and in competition with defendants F. W. Cutler and Asa B. Cutler and the Cutler Manufacturing Co., partnership; and the said Cook Grader was preferred by those in the packing trade.

V.

That the defendants F. W. Cutler and Asa B. Cutler, in order to eliminate competition and to procure plaintiff's machine, enterprise, and business, with the right to use his said invention, sought out and solicited this plaintiff for the exclusive and only manufacture and sale of said fruit grader of plaintiff, together with his designs, plans, and materials then connected therewith, and the business of this plaintiff as then conducted by him, to the end that Cutler Manufacturing Co., partnership, might become possessed of all the business of plaintiff comprehended in the exclusive making of Cook Fruit Graders.

VI.

That to accomplish their purpose, the defendants Cutler Brothers represented that they controlled the fruit grader production through their extensive organization in Portland and their other associates then in the trade, and that they could and would procure large-scale production and sales of plaintiff's fruit grader, and that with their big shop and facilities they could and would more efficiently and with larger profit produce and sell machines of plaintiff's type in large quantity and that they would and could do more with their organized manufactory and going business than plaintiff could do as he then was doing and that they desired plaintiff's machine, and that if plaintiff did not yield to their solicitation and persuasion by allowing them, the said Cutlers, to make and sell plaintiff's machine, that they would

make one so similar in principle and performance as to interfere with plaintiff's trade and nullify his patent rights.

VII.

That plaintiff, believing their said representations, and being influenced by their threat of patent-right interference, placed [6] himself in full reliance upon the said Cutlers and gave them the exclusive right to make and sell his machines for the term beginning May 1, 1928, up to and including September 30, 1933, subject to certain considerations and royalties, agreed upon between the parties, and as promised then by the Cutlers to be observed, performed and paid by them.

VIII.

That plaintiff at all times mentioned herein, believed that the Cutlers would do and perform for the advancement and interest of plaintiff's said machine if plaintiff, upon the terms they, the Cutlers, demanded, allowed the making and sale of his said machine; and not knowing or having any cause to know that the Cutlers would not do so, plaintiff, in full confidence in them, turned over his entire business to them.

IX.

That during the times hereinbefore mentioned, and at all subsequent times, said Cutlers intended to undermine and destroy plaintiff's machine and his business to the end that the grader and sorter made then by plaintiff should and would not be maintained in the trade; and the acts and representations of the

Cutlers upon which plaintiff then relied were designed to enable them to suppress his product in order that they might the better put out such machine as they themselves or their associates in the business might select.

X.

That as a vital part of the consideration to plaintiff for his grant of the said exclusive license, the defendants F. W. Cutler and Asa B. Cutler, then doing business as Cutler Manufacturing Co., a partnership, promised and agreed that the said company, during the time that the said exclusive license remained in force, would not manufacture any fruit grading machines of the same nature and for the same purpose as the said Cook Grader, except such grading machines as were being manufactured by the said company on May 4, 1928, and at that time they were not making any grading machine of the kind, nature or similar in function or principle to the Cook Grader.

XI.

That as a vital part of the consideration of the grant of the exclusive right to make and vend Cook Graders, the said defendants F. W. Cutler and Asa B. Cutler, partners as Cutler Manufacturing Co., [7] did then promise and agree that at the expiration or earlier determination of the license, plaintiff should have the exclusive right and ownership in all improvements, attachments, and designs relating to said Cook Grader and attachments developed thereafter, whether the same should have

been made by the Cutlers or Cutler Manufacturing Co., or by plaintiff, upon payment by plaintiff of the expense of the application for patent made necessary by such improvement, attachment, or design.

XII

That some time after they obtained control of plaintiff's aforesaid machine, enterprise, and business, defendants F. W. Cutler and Asa B. Cutler, partners as Cutler Manufacturing Co., then changed and altered the plaintiff's aforesaid fruit grader contrary to his designs by adding contrivances and modifications of their own conception, different in principle, in function, design, and scope than plaintiff's machine, and did wholly change and alter the plaintiff's said fruit grader as made and patented by plaintiff as to impair, and said changes, alterations, contrivances, and modifications made by Cutlers and Cutler Manufacturing Co. did impair the efficiency, usefulness, and satisfactory operation of said Cook Grader, and did render the trade and demand therefor utterly valueless to themselves and to the plaintiff, and did destroy the trade success and demand plaintiff theretofore had himself builded for his own machine, and did thereby limit and circumscribe the amount of royalty and earnings accruing to plaintiff under said license to the said defendants F. W. Cutler and Asa B. Cutler as Cutler Manufacturing Co.

XIII

That notwithstanding that they acquired the business of plaintiff in such manner and became licensees of plaintiff, F. W. Cutler and Asa B. Cutler, as Cutler Manufacturing Co., partnership, then set about to and did acquire certain rights and interests which they claimed to be adverse to plaintiff, under a patent called the Palmer Patent, No. 1251093, of December 25, 1917, which, as they claimed, threatened, and asserted, by obtaining, they could modify the plaintiff's machine without plaintiff's consent and adverse to the rights and powers under the license originally granted to them by plaintiff, and whereby, pursuant to the obtaining of [8] said Palmer patent, they altered, modified, and entirely changed the construction, use, and operation of the Cook Grader as acquired from plaintiff to a principle entirely different from that conception of the machine as licensed to them under plaintiff's said invention and patent, and builded a machine entirely different and less efficient than plaintiff's.

XIV.

That during all the times herein mentioned and up to the time that defendants Cutlers and Cutler Manufacturing Co., partnership, changed the design, plans, machine, and its construction, use, and operation, plaintiff's machine, known as the Cook Fruit Grader, was desired as an efficient, operative instrument in the sorting of fruit in the packing trade, and continued so to be until the defendants Cutler Brothers and Cutler Manufacturing Co.

changed the same, wherefrom and thereafter Cutlers and Cutler Manufacturing Co., partnership, became aware and knew that the machine that they had constructed in violation of their said license and against the interests of plaintiff then was and became a machine not as efficient, useful or desired by the packing trade as the machine of plaintiff that they had licensed; and in violation of their said license right and against the interests of this plaintiff said Cutlers and Cutler Manufacturing Co. did make and vend a machine so different in design, construction, use, and operation from plaintiff's machine as to endanger and damage the plaintiff, causing the diminution of royalties, business, and returns that could and would have been built up and maintained for plaintiff had Cutlers and Cutler Manufacturing Co., partnership, continued to make and sell the machine of this plaintiff, as they had promised to do.

XV

That to enable plaintiff to determine the royalties that were due him under the license agreement, said defendants Cutler Brothers and Cutler Manufacturing Co., partnership, promised and agreed to deliver to plaintiff by the 15th day of each month, beginning June 1, 1928, and continuing during the life of the license agreement, a written statement showing the amounts of sales, if any, during the preceding calendar month, names and addresses of purchasers, and size and character of equipment shipped, and/or delivered during such calendar

month; that said de- [9] fendants have altogether failed to comply with this promise and agreement; that plaintiff does not know the facts himself and cannot allege them; and plaintiff has demanded said information but has not received the same.

XVI

That at the time the exclusive license was granted to F. W. Cutler and Asa B. Cutler and Cutler Manufacturing Co., partnership, it was agreed by the parties that if during the term of the license agreement the company should sell its business, plaintiff should have the option either to require that the purchaser from the company should assume and discharge all the company's obligations under the license agreement or to cancel and determine the agreement and put an end to all the company's rights thereunder and prevent any rights thereunder from passing to such purchaser from the company.

XVII.

That on or about November 29, 1929, defendants Cutler Brothers and Cutler Manufacturing Co., copartnership, incorporated under the laws of the State of Oregon under the name of the Cutler Manufacturing Company, Inc., defendant herein, and took over the business and assets of the said Cutlers and Cutler Manufacturing Co., copartnership; that the defendant Asa B. Cutler was and now is its president and director, and defendant F. W. Cutler was and now is its vice-president and director.

XVIII.

That some time in the fall of 1929 or early in 1930, the defendants F. W. Cutler and Asa B. Cutler, the Cutler Manufacturing Co., copartnership, and the Cutler Manufacturing Company, corporation, were merged, combined and associated with and became a division of defendant Food Machinery Corporation in accordance with negotiations between said parties defendant, which had continued over a period of months and years immediately prior thereto; and defendant F. W. Cutler was and now is a director of the defendant Food Machinery Corporation and was and is now, by appointment, the attorney in fact and general agent within the State of Oregon for said Food Machinery Corporation; and Cutler Manufacturing Company, a corporation, did from said time hold itself out and now holds itself out to be a divisional unit of said Food Machinery Corporation. [10]

XIX.

That on or about February 27, 1929, defendant Food Machinery Corporation, then known as the John Bean Manufacturing Company, contracted to obtain and did obtain the exclusive right to make and sell what are known as Clear Fruit Graders, which are used in the packing business in competition with plaintiff's said Cook Fruit Grader and that said exclusive rights to make and use Clear Fruit Graders are now possessed by defendant Food Machinery Corporation with which defendants F. W. Cutler and Asa B. Cutler are now identified and

associated; and all the defendants participate and share in said business and the profits thereof.

XX.

That on July 26, 1930, plaintiff served written notice on all of said defendants named herein, in and by which plaintiff did require them and each of them to perform, observe, and execute the provisions and agreements made and provided in the license relating to the said Cook Grader; and that none of said defendants or any of them have performed or kept said provisions and agreements or complied with said notice; that their failure so to do now causes and has caused irreparable injury and damage to plaintiff in many thousands of dollars, as an accounting of which, if taken, will show.

XXI.

That plaintiff has fully performed and kept all conditions, considerations, and requirements stipulated to be performed by him, and has not cancelled nor breached the exclusive license agreement made between the parties herein.

XXII.

That the aforesaid acts and doings of the defendants, both severally and in combination and confederation with each other, as hereinbefore set forth, have caused and do now cause irreparable and continuing injury and damage to plaintiff in the making and selling of his fruit graders and in the business arising out of and connected therewith, as herein specified and alleged, and in the

use and enjoyment of plaintiff's invention and patent rights; and the acts of defendants as alleged have damaged and hurt plaintiff by causing the impairment and [11] loss of the use and sale of his said invention and the issues and profits rightly to be earned and paid under the terms of the agreement that defendants, as alleged, have failed to observe and keep.

XXIII.

That plaintiff has no plain, speedy, adequate, and complete remedy at law for the prevention of the frequent and recurring injuries and/or the redress of the wrongs alleged herein; and that frequent and numerous proceedings against plaintiff and/or against these or other defendants would occasion a multiplicity of actions and suits without any complete or adequate relief; and to prevent these things plaintiff brings this suit.

WHEREFORE, plaintiff prays the Court for the following relief;

1. That said defendants and each and every one of them be required to account to plaintiff for any royalties and profits which now or at any time have or might properly have accrued as the result of the manufacture and sale of Cook Fruit Graders: and to furnish written statements showing the amount of such sales, if any, the names and addresses of purchasers, and the size and character of equipment sold and/or shipped, and the dates thereof.

2. That defendants F. W. Cutler and Asa B. Cutler be required to inform the plaintiff and this

Court as to what fruit grading machines that are claimed, or that they will or might claim or assert, are of the same nature and for the same purpose as the said Cook Grader, were being manufactured by defendants F. W. Cutler and Asa B. Cutler, partners as Cutler Manufacturing Co., on May 4, 1929, or thereafter.

3. That defendants be required to pay plaintiff for any and all damage suffered by plaintiff by the acts and doings of defendants in connection with the manufacture and sale of Cook Fruit Graders either as they claim under the exclusive license agreement, or contrary thereto or in violation of the provisions thereof, as alleged herein by plaintiff.

4. That defendants F. W. Cutler and Asa B. Cutler and the Cutler Manufacturing Co., partnership, be enjoined from manufacturing any fruit grading machine of the same nature and for the same purpose as the said Cook Grader, except such grading machines as are found by the Court to have been manufactured by them on May 4, 1928.

5. That defendant Cutler Manufacturing Company, corporation, be found by this Court to stand in the position of assignee of the exclusive [12] rights granted by plaintiff to defendants F. W. Cutler and Asa B. Cutler, doing business as Cutler Manufacturing Co., copartnership, and is and has become bound by provisions of the exclusive license agreement.

6. That if plaintiff's fifth request is found for plaintiff, defendant Cutler Manufacturing Company, a corporation, then be enjoined from the manu-

facture and sale of any fruit grading machine of the same nature and for the same purpose as the said Cook Grader, except such grading machines as were being manufactured by Cutler Manufacturing Co., copartnership, on May 4, 1928.

7. That if it be found by this Court that defendant Cutler Manufacturing Company, a corporation, is not personally bound by the terms of the original license agreement, said defendant Cutler Manufacturing Company, a corporation, be enjoined from manufacturing any fruit grading machine of the same nature and for the same purpose as the said Cook Grader, except such grading machines as were being manufactured by defendant Cutler Manufacturing Co., a copartnership, on May 4, 1928, so long as defendants F. W. Cutler and Asa B. Cutler are connected or identified therewith.

8. That defendant Food Machinery Corporation, a Delaware corporation, be found by this Court to stand in the position of assignee of the exclusive rights granted by plaintiff to defendants F. W. Cutler and Asa B. Cutler, doing business as Cutler Manufacturing Co., copartnership, and is now and has become bound by the provisions of the exclusive license agreement.

9. That if plaintiff's eighth request is found for plaintiff, defendant Food Machinery Corporation then be enjoined from the manufacture and sale of any fruit grading machine of the same nature and for the same purpose as the said Cook Grader, except such grading machines as were being manu-

factured by Cutler Manufacturing Co., copartnership, on May 4, 1928.

10. That if it be found by this Court that defendant Food Machinery Corporation is not personally bound by the terms of the original license agreement, defendant Food Machinery Corporation be enjoined from the manufacture of any fruit grading machines of the same nature and for the same purpose as the said Cook Grader except such grading machines as were being manufactured by the Cutler Manufacturing Co., copartnership, [13] on May 4, 1928, so long as defendants F. W. Cutler and Asa B. Cutler continue to participate in or are connected or identified with said Food Machinery Corporation or any division or subdivision thereof.

11. That the Court declare that plaintiff is entitled to all improvements, attachments, and designs relating to the said Cook Grader developed subsequent to May 4, 1928, whether the same were made by defendants Cutlers or by plaintiff, upon payment by plaintiff of the expense of application for patent which may have been made by defendants Cutler Brothers in obtaining and perfecting an improvement, attachment, or design relating to said Cook Grader, if any.

12. That the Court award plaintiff his costs and disbursements in this suit.

13. That the Court grant plaintiff such different, other further, and additional relief, both

general and special, as to the Court may seem just, equitable, and right.

W. C. BRISTOL
WM. L. GOSSLIN
Attorneys for Plaintiff.

State of Oregon
County of Multnomah—ss.

I, Floyd J. Cook, being first duly sworn, depose and say that I am the Plaintiff in the above entitled suit; and that the foregoing Complaint is true as I verily believe.

FLOYD J. COOK

Subscribed and sworn to before me this 17th day of December, 1930.

[Notarial Seal] WM. L. GOSSLIN
Notary Public for the State of Oregon. My Commission Expires November 14, 1934.

[Endorsed]: Filed Dec. 17, 1930. [14]

AND AFTERWARDS, to-wit, on the 12th day of February, 1931 there was duly filed in said Court, an Answer of Asa B. Cutler and F. W. Cutler, in words and figures as follows, to-wit: [15]

[Title of Court and Cause.]

ANSWER OF ASA B. CUTLER, F. W. CUTLER AND CUTLER MANUFACTURING CO., A PARTNERSHIP.

Come now the defendants, Asa B. Cutler and F. W. Cutler, individually and as partners doing business under the name of Cutler Manufacturing Co., Cutler Manufacturing Company, Inc., an Oregon corporation, and for answer to the plaintiff's bill of complaint, admit, deny and allege as follows, to-wit:

I.

Answering Paragraph I of said complaint said defendants deny that they have any knowledge or information sufficient to form a belief as to whether or not about the year 1925 plaintiff conceived and commenced the construction of a fruit grader and sorter, and therefore deny the same; admit that plaintiff had constructed one or more machines, but deny that they have any knowledge or information sufficient to form a belief as to whether or not plaintiff had constructed four or more [16] machines, and therefore deny the same, and deny that by the season of 1926-1927 the said machine had come into use as a practical or workable machine.

II.

These defendants admit that letters patent of the United States No. 1646951 was issued to the plaintiff on October 25, 1927 for a machine known as Cook Fruit Grader and Sorter, and that on December 4, 1928 the plaintiff obtained a re-issue of said patent, said re-issue being numbered 17149, and with reference thereto these defendants allege that the said re-issue of said patent was secured by the plaintiff at the suggestion of the defendants Asa B. Cutler and F. W. Cutler because the claims under the original patent issued to the said plaintiff were not in the opinion of said defendants Cutlers broad enough to amply protect the said plaintiff.

III.

Admit Paragraph III of plaintiff's complaint.

IV.

These defendants deny that said plaintiff was manufacturing or selling said graders for the packing trade successfully or profitably, or in competition with the said defendants Cutler and Cutler Manufacturing Co., a partnership, and deny that the said Cook Grader was preferred by those in the packing trade, but admit that the plaintiff had manufactured and sold one or more, but not to exceed four, of said graders prior to the 4th day of May, 1928.

V.

These defendants deny that the said F. W. Cutler and Asa B. Cutler, or either of them, in order to

eliminate competition or otherwise, or to procure plaintiff's machine, or enterprise, or business, with the right to use the said plain- [17] tiff's said invention sought out or solicited the plaintiff for the exclusive or only manufacture or sale of said fruit grader of plaintiff, together with his designs, or plans, or materials then connected therewith or at all, or the business of said plaintiff as then conducted by him to the end that Cutler Manufacturing Co., a co-partnership, might become possessed of all the business of plaintiff comprehended in the exclusive making of said Cook fruit graders or to any other end, but allege that the said plaintiff solicited the said defendants Cutler on account of their having a large plant suitable for the manufacture of said machine and a large selling force and organization suitable for putting said machine on the market, to enter into a contract whereby the said defendants Cutler would manufacture and sell said machine, paying the plaintiff a royalty therefor, and as a result of such solicitation of the defendants by said plaintiff, and not otherwise, the said contract between the said plaintiff and said defendants Cutler referred to in plaintiff's complaint and hereinafter referred to, was entered into.

VI.

These defendants deny that to accomplish their purpose, or otherwise, or at all, the defendants Cutler represented that they controlled the fruit grader production through their extensive organization in

Portland, or their other associates then in the trade, or that they could or would procure large scale production, or sales of plaintiff's fruit grader, or that with their big shop or facilities, or otherwise, they could or would more efficiently or with larger profit produce or sell machines of plaintiff's type in large or any quantity, or that they would or could do more with their organized manufactury or going business than plaintiff could do as he was then doing, or that they desired plaintiff's machine, or [18] that if plaintiff did not yield to their solicitation or persuasion by allowing them, the said Cutlers, to make or sell plaintiff's machine that they would make one so similar in principle or performance as to interfere with plaintiff's trade or nullify his patent rights, and specifically deny that the said defendants Cutler, or the Cutler Manufacturing Co., a partnership, made any representations in regard to their ability or willingness to manufacture or sell said machine other than as contained in the contract of May 4, 1928 referred to in plaintiff's complaint and hereinafter referred to, and a copy of which said contract is attached to this answer, marked Exhibit I, hereby referred to and made a part hereof, and with reference thereto these defendants allege that there was no inducement on the part of the defendants to the plaintiff to enter into any contract for the production and sale of said machine other than the knowledge on the part of the plaintiff of the character of business which the said defendants Cutler

and Cutler Manufacturing Company, a co-partnership, was engaged in at said time.

VII.

These defendants deny that the plaintiff, believing their said representations or any representations, or being influenced by their threat of patent-right interference, or relying upon any representations made by the said defendants, or being influenced by any act on the part of the said defendants, placed himself in full or any reliance upon the said Cutlers, or on account of any representations of the defendants, or being influenced by any act of the defendants, gave to said defendants the exclusive right to make or sell his machine, but admit that the plaintiff and the said defendants Cutlers, co-partners as Cutler Manufacturing Co., on May 4, 1928 entered into the contract attached to this answer and marked Exhibit I, and which said contract defines the [19] full rights of the plaintiff and said defendants with reference to the right to manufacture and sell said machines and the term thereof.

VIII.

In answer to Paragraph VIII of plaintiff's complaint, these defendants deny that plaintiff at all or any times mentioned in the complaint believed that the Cutlers would do or perform for the advancement or interest of plaintiff's said machine, if plaintiff upon the terms they the Cutlers demanded or allowed the making or sale of said machine, or not knowing or having any cause to know that the

Cutlers would not do so, plaintiff in full confidence in them, or otherwise, turned over his entire business to them, and specifically deny that said plaintiff acted in said matter on any other ground or any other reason, or for any other purpose than that expressed in the contract marked Exhibit I attached to this answer, and said defendants allege that the said plaintiff relied entirely upon the terms of said contract and the considerations moving to him therefrom and not otherwise as the inducement for entering into the same.

IX.

These defendants deny that the said Cutlers at any time, or at all, intended to undermine or destroy plaintiff's machine, or his business, for any purpose whatever, and deny that any acts or representations of the Cutlers were designed to enable the said Cutlers to suppress the plaintiff's product either in order that they might the better put out such machine as they themselves, or their associates in the business, might select, or for any purpose whatever.

X.

These defendants admit that the said defendants, F. W. Cutler and Asa B. Cutler, then doing business as Cutler [20] Manufacturing Co., a partnership, agreed that said partnership during the time that said exclusive license remained in force would not manufacture any fruit grader machine of the same nature or for the same purpose as the Cook fruit grader, except such grading machines as were being

manufactured by the said company on May 4, 1928, but deny that at said time they were not making any machine of the kind or nature or similar in function or principle to the Cook grader, and with reference thereto these defendants refer to the provisions of Exhibit I attached to this answer for the full provisions of the contract and undertakings of the said parties hereto, and allege that said contract recognized the right of the said defendants Cutler and Cutler Manufacturing Co., a partnership, to sell its or their business, or to go out of business altogether during the said period, or in the event the commissions provided for in said contract for the year 1928 and the royalties accruing thereunder to October 1, 1931, did not equal or exceed the sum of $15,000.00 the said defendants Cutler and Cutler Manufacturing Company, a partnership, were not required to continue to manufacture or sell said machine.

XI.

These defendants admit Paragraph XI and the whole thereof.

XII.

These defendants deny that at any time after they obtained control of plaintiff's machine, or enterprise, or business, the defendants F. W. Cutler or Asa B. Cutler, partners as Cutler Manufacturing Co., then or at all changed or altered the plaintiff's fruit grader contrary to his designs by adding contrivances or modifications of their own conception, different in principle or function or design or scope,

than plaintiff's machine, or did [21] wholly or at all change or alter plaintiff's said fruit grader as made or patented by plaintiff as to impair the same, or that any changes or alterations or contrivances or modifications made by the said Cutlers, or the Cutler Manufacturing Company, did impair the efficiency or usefulness or satisfactory operations of said grader, or did render the trade or demand therefor utterly valueless to themselves, or to the plaintiff, or did destroy the trade success or demand plaintiff theretofore had himself builded for his said machine, or did thereby limit or circumscribe the amount of royalty or earnings accruing to plaintiff under said license to the said defendants, F. W. Cutler and Asa B. Cutler, as Cutler Manufacturing Co., and with regard thereto the said defendants allege that any and all improvements, changes, alterations or modifications of said machine made by the said defendants Cutler, or the Cutler Manufacturing Co., a co-partnership, were prior to the manufacture and/or sale of the same submitted to, approved by, and the manufacture and sale thereof with said changes, modifications or alterations were specifically assented to by the said plaintiff, Cook, and that furthermore the said defendants Cutler had the right under the said contract with the plaintiff to make modifications, improvements, attachments and designs relating to said Cook grader, subject only to that provision of Paragraph Tenth of said contract, Exhibit I hereto attached, that upon the expiration of said agreement or earlier determination the said

plaintiff should have the exclusive right and ownership in all such improvements, attachments and designs relating to said Cook grader, whether made by the defendants Cutler or the said plaintiff.

XIII.

In answer to Paragraph XIII these defendants deny that the said defendants Cutler, as Cutler Manufacturing Co., a [22] partnership, set about to or did acquire certain rights and interests which they claim to be adverse to plaintiff under a patent called the Palmer Patent, No. 1251093 of December 25, 1917, and deny that they, the said defendants Cutler, claimed or threatened or asserted that by obtaining said Palmer patent they could modify the plaintiff's machine without plaintiff's consent, or adverse to the rights or powers under the license originally granted to them by the plaintiff, or whereby pursuant to the obtaining of said Palmer patent, or otherwise, they altered or modified or entirely changed the construction or use or operation of the Cook grader as required from plaintiff to a principle entirely different from that conception of the machine as licensed to them under plaintiff's said invention or patent, or builded a machine entirely different or less efficient than plaintiff's, and with reference thereto the said defendants allege that they acquired the Palmer patent not as a means or for the purpose of interfering with the use of the Cook grader, but as a protection to the said Cook grader, and the right to manufacture and sell the same, and that the same was acquired by the defend-

ants Cutler with full knowledge on the part of the plaintiff, and with his consent and approval thereof, and not otherwise, and that said rights under said Palmer patent were used by the defendants only as a protection against claimed infringement against the said Cook grader.

XIV.

These defendants deny that during all or any of the times mentioned in the complaint that the defendants Cutler and Cutler Manufacturing Co., a partnership, changed the design, or plans or machine or its construction or use or operation of plaintiff's machine known as the Cook grader; deny that said Cook grader was desired as an efficient or operative instrument in the sorting of fruit in the packing trade, or continued so until de- [23] fendants Cutler or Cutler Manufacturing Co., a partnership changed the same, and deny that the Cutlers, or the Cutler Manufacturing Co., a partnership, became aware or knew that the machine which they had constructed was in violation of their said license or against the interests of the plaintiff, or that the same then was or became a machine not as efficient or useful or desired by the packing trade as the machine of the plaintiff that they had licensed, and deny that in violation of said license right or against the interests of the said plaintiff said Cutlers or Cutler Manufacturing Co., a partnership, did make or vend a machine so different in design, or construction, or use, or operation from plaintiff's machine as to endanger or damage the plaintiff, or to cause diminu-

tion of royalties or business or returns that could or would have been built up or maintained for plaintiff had the said Cutlers or the Cutler Manufacturing Co., a partnership, continued to make or sell the machine of said plaintiff as they had promised to do, and with reference thereto these said defendants allege that no changes whatever in design or construction or use or operation in the said machine were made without the full consent and approval of such changes on the part of the said plaintiff before any machine containing any such changes was sold.

XV.

Deny that the said defendants have altogether or at all failed to comply with the promise or agreement to furnish the plaintiff with the information provided for in said contract as to the amount of sales and the names and addresses of purchasers and the size and character of the equipment shipped and/or delivered during each calendar month, and deny that the plaintiff has failed to receive such information, but with reference thereto these defendants allege that with the consent and approval of the plaintiff [24] these answering defendants did furnish from time to time statements of the sales, the amount of commissions and royalties due the plaintiff thereunder; that said statements were in form and substance satisfactory to the plaintiff, received by him without objection and without any demand for more particular statements until just prior to the commencement of this suit; that at said time

and on said demand of the plaintiff the said defendants Cutler furnished full information as to all sales, the months during which said sales were made, together with the names and addresses of the purchasers and the size and character of the equipment shipped and/or delivered during each calendar month; that a full, true and correct copy of the statement so furnished the plaintiff prior to the commencement of this suit is hereto attached, marked Exhibit II, and with reference thereto these defendants allege that said statement contains a full, true and correct statement of the entire sales, and is a full, true and correct statement and accounting as to all sales made by these answering defendants under said contract, together with additional commissions earned and paid by the said defendants to the plaintiff on account of sales of other equipment besides the said Cook grader and which were not provided in said contract.

XVI.

With reference to Paragraph XVI of plaintiff's complaint these answering defendants refer to Paragraph Eleventh of the contract between the parties as set out in Exhibit I hereto attached, hereby made a part hereof, for the full ascertainment of the undertaking of these answering defendants in the event of the sale of said business; that the said allegations of the said sixteenth paragraph are substantially correct except that the plaintiff has used the word "determine" instead of "terminate" and if there is

any distinction assert that the provisions of Paragraph [25] Eleventh of the contract should control.

XVII.

Answering Paragraph XVII of plaintiff's complaint these defendants deny that on or about November 29, 1929 the Cutler Manufacturing Co., Inc. was incorporated or took over the business or assets of the said Cutler and Cutler Manufacturing Co., a partnership, but admit that on said November 29, 1929 articles of incorporation of the Cutler Manufacturing Co. Inc. were filed in the office of the Corporation Commissioner of the State of Oregon, but allege that said incorporation was not completed nor the capital stock thereof subscribed until on or about the 14th day of February, 1930, at which time the said incorporation was completed, and on said date all of the property and assets of the said Cutlers and Cutler Manufacturing Co., a partnership, were transferred by proper instruments to the said Cutler Manufacturing Company, Inc. and the said plaintiff was notified thereof.

XVIII.

These defendants deny that sometime in the fall of 1929 or early in 1930, or at all, the defendant Asa B. Cutler and F. W. Cutler, or either of them, or the Cutler Manufacturing Co., a co-partnership, or the Cutler Manufacturing Company, Inc. a corporation, were merged or combined or associated with or became a division of the defendant Food

Machinery Corporation in accordance with negotiations between said parties defendant which had continued over a period of months or years immediately prior thereto, or that any of such enterprises were merged or combined or associated with or became a division of defendant Food Machinery Corporation at all, but admit that F. W. Cutler now is a director of the defendant Food Machinery Corporation, and has been such director at all times since the transfer of said property to the [26] Food Machinery Corporation. These defendants admit that said F. W. Cutler is and has been the attorney in fact and general agent of the defendant Food Machinery Corporation in the State of Oregon at all times subsequent to the transfer of said property to the Food Machinery Corporation, but not prior thereto; these defendants deny that Cutler Manufacturing Company, a corporation, did at any time hold itself out or now holds itself out to be a divisional unit of the Food Machinery Corporation, and with reference thereto these defendants allege: that on or about the 25th day of June, 1930, and not prior thereto, the Cutler Manufacturing Company, Inc., a corporation, did for a valuable consideration to it moving, sell, assign and transfer to the Food Machinery Corporation all of its assets and business of every name and nature, excepting only any rights of the said F. W. Cutler, Asa B. Cutler, Cutler Manufacturing Co., a co-partnership, or Cutler Manufacturing Company Inc. in and under the contract between the plaintiff and the defendants, F. W. Cutler and Asa B. Cutler, dated

May 4, 1928, a copy of which is hereto attached as Exhibit I, and the said Food Machinery Corporation assumed no obligations under said contract; that in and by said transfer the said Cutler Manufacturing Company, Inc. transferred the good will of said business, including the right of the Food Machinery Corporation to use the name Cutler Manufacturing Company in connection with the conduct of its said business, and that any use of the name Cutler Manufacturing Co. as a divisional unit of said Food Machinery Corporation was simply a use thereof to the full enjoyment of the good will of the said Cutler Manufacturing Company, Inc. and was not a separate entity, but simply an indication that the business of the said Cutler Manufacturing Company, Inc. had been acquired by the Food Machinery Corporation; these said defendants further allege that the defendant, Food Machinery Corporation, refused to accept any rights under the said contract between the plaintiff and the defendants Cutler dated May 4, 1928, or to assume any obligations thereunder on [27] the ground and for the reason that said Food Machinery Corporation had theretofore entered into an exclusive contract for the manufacture and sale of the Clear Fruit Grader and was not permitted to manufacture or sell any other machine of that character or for that purpose.

XIX.

Answering Paragraph XIX, these defendants admit that on or prior to the 27th day of February,

1929 the defendant, Food Machinery Corporation, then known as the John Bean Manufacturing Company, obtained exclusive right to make and sell what is known as the Clear Fruit Graders, which are used in the packing business in competition with the plaintiff's said Cook Fruit Grader, and that said exclusive rights to make and use Clear Fruit Graders are now possessed by defendant, Food Machinery Corporation; these defendants deny that the defendants, F. W. Cutler and Asa B. Cutler, are now identified or associated with the said Food Machinery Corporation except that the said F. W. Cutler is a director of the said Food Machinery Corporation, and he and the said Asa B. Cutler are employed by said Food Machinery Corporation; these defendants deny that all of the defendants participate and share in said business and the profits thereof, except that the said defendants, F. W. Cutler and Asa B. Cutler, are employed by Food Machinery Corporation, and the defendant Cutler Manufacturing Co., Inc. is a stockholder in said Food Machinery Corporation.

XX.

These defendants admit that on July 26, 1930 the plaintiff did serve written notice on all of the defendants in and by which plaintiff did attempt to require them and each of them to perform, observe and execute the provisions and agreements made and provided in the license agreement relating to the said Cook grader, but these defendants deny that they or any [28] of them have failed to per-

form or keep said provisions or agreements or comply with said notice; these defendants deny that any failure on their part so to do now or at any time causes or has caused irreparable or any injury or damage to plaintiff in many thousands of dollars, or any sum whatever, or that any accounting, if taken, will show that any sum of money is due from the defendants, or any of them, to the said plaintiff, and with reference thereto these defendants allege that said defendants Cutler and Cutler Manufacturing Co., a co-partnership, has fully carried out each and all of the provisions of said contract and has fully accounted for each and all of the sales made thereunder, and has paid to the plaintiff more than the amount due him under said contract as hereinafter alleged; that these answering defendants had the right to sell said business and the plaintiff had the right under his said agreement, if the purchaser of said business should refuse to take over said contract, to cancel the same and continue to manufacture the Cook grader himself, but the said plaintiff has wholly failed and neglected to exercise his right in that regard.

XXI.

These answering defendants deny that the plaintiff has fully or at all performed or kept all conditions or considerations or requirements stipulated to be performed by him, or has not cancelled or breached the exclusive license agreement made between the parties herein.

XXII.

These defendants deny that the acts and doings of the defendants alleged in said complaint severally or in combination or confederation with each other, or otherwise, have caused or do now cause irreparable or any or continuing injury or damage [29] to the plaintiff in the making or selling of his fruit graders, or in the business arising out of or connected therewith, or at all, or any use or enjoyment of plaintiff's invention or patent rights, or that the acts of the defendants as alleged, or otherwise, have damaged or hurt plaintiff by causing the impairment or loss of the use or sale of his said invention, or the issues or profits rightly or at all to be earned or paid under the terms of the agreement between the defendants Cutler and the plaintiff or the defendants or any of them have failed to observe or keep each or all of said provisions.

XXIII.

Deny that plaintiff has no plain or speedy or adequate or complete remedy at law for the prevention of the frequent or any or recurring injuries and/or redress of the wrongs alleged in plaintiff's complaint, and deny that frequent or numerous or any proceedings against the plaintiff and/or against these or other defendants would occasion a multiplicity of actions or suits without any complete or adequate or any relief.

For a FIRST, further and separate answer and defense to plaintiff's complaint, these defendants allege:

I.

That the defendants, Asa B. Cutler and F. W. Cutler, did enter into an agreement with the plaintiff, the full terms of which are set out in Exhibit I hereto attached, hereby referred to, and made a part hereof.

II.

That heretofore the said defendants, F. W. Cutler and Asa B. Cutler, did on or about the 15th day of February, 1930, sell, assign and transfer unto the Cutler Manufacturing Company, Inc. [30] a corporation organized under the laws of the State of Oregon, all of their business and assets conducted under the name of the Cutler Manufacturing Co., a co-partnership, and did thereafter notify the plaintiff Cook of such sale, assignment and transfer.

III.

That the plaintiff failed and refused to exercise his option to determine said contract and to take over all of the materials on hand for the manufacture of said graders, or to take any action in the premises whatever.

For a SECOND, further and separate answer and defense to plaintiff's complaint, these defendants allege:

I.

That heretofore and on the 4th day of May, 1928, the plaintiff and these defendants, F. W. Cutler and Asa B. Cutler, co-partners as Cutler Manufacturing Co., entered into an agreement, the

full terms of which are set out in Exhibit I hereto attached, hereby referred to and made a part of this answer.

II.

That thereafter the defendants Cutler proceeded to manufacture and sell said grader referred to in said contract, but on account of complaints received by the said defendants Cutler it was determined that said machine was not performing the functions for which the same was designed, and would not without improvement perform the same; that the said defendants did thereupon experiment for the purpose of correcting said defects, with a view of making said machine perform said functions, and did thereafter submit to the plaintiff proposed changes and improvements therein, and did exhibit to said plaintiff a machine with said improvements designed to correct said defects, and said exhibition was made prior to the sale of any of such machine with [31] such changes; that the plaintiff admitted the defects in said machine, approved all of the changes suggested by the said defendants for the correction thereof before any sale of any machine with said changes embodied therein and approved the sale of said machine with said changes; that the said improved machine contained all of the changes made by the defendants in said machine and the said plaintiff authorized and directed the said plaintiff to manufacture said machines with the changes and improvements so made; that thereupon these defendants Cutler thereafter manufactured and sold said machines with the

changes and improvements so submitted to the plaintiff and approved by him and not otherwise.

III.

That no machines were ever sold by these answering defendants, except with the changes and improvements so made by them and approved and assented to by the plaintiff.

IV.

That by reason of the facts herein stated the plaintiff is estopped and should not be heard to say that the defendants Cutler, partners as Cutler Manufacturing Company, or the Cutler Manufacturing Company, Inc. changed said design or machine which it was licensed to sell or manufacture and sold a machine other than that as licensed to them by the said plaintiff, or that the said machine so manufactured and sold by them was not the machine licensed to them, or that the sale of said machine was damaged or the business of plaintiff was by said changes or improvements damaged, or that the same diminished plaintiff's royalties, business or returns that could or would have been built up or maintained for plaintiff. [32]

For a THIRD, further and separate answer and defense to plaintiff's complaint, and by way of counterclaim on the part of Asa B. Cutler and F. W. Cutler against said plaintiff, these defendants allege:

I.

That heretofore the plaintiff and these answering defendants, Asa B. Cutler and F. W. Cutler,

doing business as Cutler Manufacturing Company, a co-partnership, did make, execute and deliver unto each other a contract in words and figures as set out in Exhibit I hereto attached, hereby referred to and made a part of this answer.

II.

That thereafter the said defendants, Cutler, did enter upon the manufacture and sale of the machine licensed to it under said agreement dated May 4, 1928, and did advertise and endeavor to sell the same with the same activity and energy that it advertised and endeavored to sell other articles manufactured by them.

III.

That the said defendants did thereafter from time to time deliver to the plaintiff accounts of sales made by them, and the plaintiff did accept the same and receive payment thereunder without objection; that thereafter and upon demand of the plaintiff the said defendants Cutler did furnish to the plaintiff a full account of all sales by months, together with the names and addresses of purchasers of said machine, together with the size and character of the equipment shipped and/or delivered during each calendar month, a full, true and correct copy of such statement is hereto attached, marked Exhibit II, hereby referred to and made a part hereof, and that the said statement contains a full, true and correct statement of all machines manufactured and sold by the plaintiff under said contract, and all of the

information required by the said contract to be furnished to the [33] plaintiff, and contains a full, true and correct statement of all of the commissions and royalties undertaken by the said defendants Cutler to be paid to the plaintiff for all machines manufactured and sold by the said defendants under said contract.

IV.

That in and by said contract the defendants Cutler had the right to sell their business and did on or about the 15th day of February, 1930, sell, assign and transfer all of its business to the Cutler Manufacturing Company, an Oregon corporation; that thereafter the said Cutler Manufacturing Company, Inc., a corporation, did sell, assign and transfer all of its business, except any right, title or interest in or to the contract between the plaintiff and the defendants Cutler dated the 4th day of May, 1928, for a valuable consideration to it moving, to the Food Machinery Corporation, a Delaware corporation; that upon each sale of said business the plaintiff was duly notified of such sale.

V.

That in and by the contract of May 4, 1928 it was provided that the defendant should pay to the plaintiff the sum of $300.00 per month for a period of twelve months, beginning May 31, 1928, and that if the royalties and commissions accruing under said contract should exceed the sum of $3600.00, the company should pay to the plaintiff the difference; that if on May 1, 1929 the royalties and commissions accruing thereunder should be less than

$3600.00 the said sum of $3600.00 should be treated as guaranteed royalties and commissions by the company, to be retained by the said plaintiff, and that the deficit between the amount of said royalties and commissions and $3600.00 should not be thereafter charged by the company against subsequent accruing royalties. [34]

VI.

That in the payments made to the said plaintiff the said defendants Cutler failed to take into account in determining the amount due as royalties and commissions the commissions paid to the said plaintiff on the said Cook grader during the year 1928, and defendants paid to the said plaintiff the sum of $1296.27 over and above the commissions and royalties so earned under said contract.

WHEREFORE, these defendants having answered plaintiff's complaint, pray that plaintiff take nothing by his complaint and that these defendants, Asa B. Cutler and F. W. Cutler have and recover of and from the plaintiff the sum of $1296.27, and that these defendants have and recover of and from plaintiff their costs and disbursements herein incurred.

WILSON & REILLY

Attorneys for Defendants, Asa B. Cutler, F. W. Cutler, co-partners doing business as Cutler Manufacturing Co., and Cutler Manufacturing Company, Inc. a corporation.

F. J. HAMBLY,

Of Counsel for defendants.

United States of America,
District of Oregon.—ss.

Asa B. Cutler, being first duly sworn, on his oath, deposes and says: that he is one of defendants above named, that he has read the foregoing answer, knows the contents thereof, and that the same is true as he verily believes.

ASA B. CUTLER

Subscribed and sworn to before me this 20th day of February, 1931.

[Seal] ROSE W. SHENKER
Notary Public for Oregon.

My Commission expires Jan. 8, 1932.

[Endorsed]: Filed February 21, 1931. [35]

AND AFTERWARDS, to wit, on the 4th day of March, 1931, there was duly filed in said Court, a Reply to Answer of Asa B. Cutler and F. W. Cutler, in words and figures as follows, to wit: [36]

[Title of Court and Cause.]

REPLY OF PLAINTIFF TO ANSWER OF ASA B. CUTLER, F. W. CUTLER, AND CUTLER MANUFACTURING CO., A PARTNERSHIP.

Comes now the plaintiff Floyd J. Cook, and for reply to so much of the answer as may be material and which contains among its admissions and denials other allegations of fact, to the sufficiency and

materiality of which this plaintiff does now reserve all manner of objection and exception, but does deny each and every matter and thing specifically and generally, alleged among the various admissions and denials of said answer, and more particularly the affirmative matter, as follows:

I.

So much thereof as is contained within lines 10 to 15, page 2, in paragraph II.

II.

So much thereof as is contained within lines 8 to 18, page 3, in paragraph V. [37]

III.

So much thereof as is contained within lines 12 to 18, page 4, in paragraph VI.

IV.

So much thereof as is contained within lines 16 to 20, page 5, in paragraph VIII.

V.

So much thereof as is contained within lines 11 to 21, page 6, in paragraph X.

VI.

So much thereof as is contained within lines 12 to 29, page 7, in paragraph XII.

VII.

So much thereof as is contained within lines 16 to 25, page 8, in paragraph XIII.

VIII.

So much thereof as is contained within lines 18 to 22, page 9, in paragraph XIV.

IX.

So much interest as is contained within lines 30 to 31, page 9, and lines 1 to 22, page 10, in paragraph XV.

X.

So much thereof as is contained within lines 10 to 17, page 11, in paragraph XVII.

XI.

So much thereof as is contained within lines 9 to 29, inclusive, page 12, in paragraph XVIII.

XII.

So much thereof as is contained within lines 8 to 19, page 14, in paragraph XX. [38]

TO THE FIRST, FURTHER, AND SEPARATE ANSWER AND DEFENSE, THIS PLAINTIFF DENIES:

I.

The whole and every part of paragraph III thereof, lines 6 to 9, inclusive, page 16.

II.

This plaintiff specifically denies that any notice as referred to in said affirmative answer was ever given, except on the 5th day of April, 1930, on the letterhead of Cutler Manufacturing Co., as a division of Food Machinery Corporation, 404 East Mill Street, at Grand Ave., Portland, Oregon, as follows, to wit:

"Mr. Floyd J. Cook
Corbett Bldg.
Portland, Oregon
Dear Sir:

We desire to give notice that the Cutler Manufacturing Company, Inc. has taken over the business and assets of the Cutler Manufacturing Company, co-partnership.

Yours truly,
CUTLER MANUFACTURING CO. INC.
By A B Cutler
ABC PK President"

And save and except that certain letter from James G. Wilson, dated June 30, 1930, to wit:

"Dear Sir:

"Referring to your letter of April 29th, and subsequent telephone conversation with you in regard to offer made by you on behalf of Mr. Cook in connection with the contract between Mr. Cook and Mr. Asa B. Cutler and F. W. Cutler of May 4, 1928, as I advised you at the time the offer would not be acceptable but stated I would submit the same, I am now authorized to say that the Cutlers will not consider the offer you made. This of course is without prejudice to the rights of the Cutlers or the Cutler Manufacturing Co. Inc.

"I am further authorized to advise you that the Cutler Manufacturing Co. Inc. has transferred its business to the Food Machinery Corporation. Mr. Cook was notified of the trans-

fer [39] of the business from the Cutler Manufacturing Co., a co-partnership, to the Cutler Manufacturing Co. Inc., but to date has exercised no option accorded him under the contract.

"Mr. Asa B. Cutler and F. W. Cutler consider they have no further interest in the contract except to finish up the material on hand as provided for in said contract, and they will send Mr. Cook statement of royalties due him with check to cover within a few days.

"I am writing this as attorney for Mr. Asa B. Cutler and F. W. Cutler and the Cutler Manufacturing Co. Inc. I am sending a copy of this letter to Mr. Floyd J. Cook, Corbett Building, Portland, Ore.

Very truly yours,

JGW:S (Signed) James G. Wilson"

TO THE SECOND, FURTHER, AND SEPARATE ANSWER AND DEFENSE, THIS PLAINTIFF FOR REPLY, DENIES:

I.

Each and every matter and thing set out and alleged within lines 20 to 31, page 16, and lines 1 to 12, page 17, in paragraph II thereof.

II.

All the matters and things set out and alleged in paragraph III thereof.

III

All the matters and things set out and alleged in paragraph IV thereof.

IV.

And for further reply to the matters set forth, and by way of exception to the insufficiency thereof, the plaintiff Cook says: That no estoppel could arise on the facts set forth or stated for, as appears from the whole of said answer, and from the affirmative parts thereof, and to that particular portion to which this reply is now directed, to wit, the second, having reference to exhibit 1 attached thereto, all the defendants [40] sustained and held, and do still sustain and hold to the plaintiff a fiduciary relationship and special agency concerning which no estoppel can arise in law or equity against this plaintiff.

TO THE THIRD, FURTHER, AND SEPARATE ANSWER THIS PLAINTIFF FOR REPLY, DENIES:

I.

All the matters and things set forth within lines 13 to 17, page 18 in paragraph II thereof and each and every thing therein contained save and except that it is admitted that the defendants made the agreement dated May 4, 1928.

II.

All the matters and things set forth and alleged within lines 19 to 32, page 18, and lines 1 to 5, page 19, in paragraph III, and the whole thereof.

III.

Each and every matter and thing within lines 6 to 18, page 19, in paragraph IV thereof.

IV.

That while it is true that some of the matters and things set forth in paragraph V, lines 20 to 31, page 19, are in apparent accord with Exhibit 1 referred to in said affirmative answer, this plaintiff denies that the matters and things alleged in paragraph V are sufficient or constitute any defense for that, the statement attached to the answer, Exhibit 2, on its face shows by the acts and doings of the defendants themselves a different interpretation than they now put upon it, to wit: The payment and application of the very sums, in accordance with the allegations of the complaint first filed herein and not in accordance with said answer [41] and the defendants should or ought to be bound by their own acts and interpretation in pursuance of their relationship with plaintiff, whatever it was.

V.

Each and every matter and thing set forth and alleged within lines 1 to 8, page 20, in paragraph VI thereof, and denies specifically that there was ever paid at any time or at all commissions or royalties over and above those earned under the actual transactions conducted by defendants with plaintiff as alleged in the complaint.

VI.

Further replying to said answer in that behalf, plaintiff Cook says that Exhibit 2 and the actual transactions which took place and are not recorded

thereon, will of and by itself and from proof offered be shown to be incorrect.

WHEREFORE, plaintiff prays judgment as formerly prayed in his complaint; and that defendants take nothing by their said answer.

W. C. BRISTOL
WM. L. GOSSLIN
Attorneys for Plaintiff.

United States of America,
District and State of Oregon,
County of Multnomah—ss.

Floyd J. Cook, being first duly sworn, on oath says: That he is the plaintiff named in the foregoing reply; that he has read the answer of Asa B. Cutler, F. W. Cutler, and Cutler Manufacturing Co., a partnership, and makes this reply thereto, and that he verily believes the same to be true.

FLOYD J. COOK

Subscribed and sworn to before me this 4th day of March, 1931.

[Notarial Seal] WM. L. GOSSLIN
Notary Public for Oregon. My commission expires Nov. 14, 1934.

[Endorsed]: Filed March 4, 1931. [42]

AND AFTERWARDS, to wit, on the 31st day of March, 1933, there was duly filed in said Court, a Report of the Master in Chancery, in words and figures as follows, to wit: [43]

[Title of Court and Cause.]

MASTER'S REPORT.

To the Honorable, the Judges of the above entitled Court, sitting in Equity:

The undersigned, Master in Chancery appointed to take evidence on the issues in the above entitled suit and make report to the court of his findings, conclusions and recommendations, begs leave to report as follows: [44]

This suit arises out of a contract executed May 4th, 1928, between Floyd J. Cook, hereinafter referred to as the patentee, and Asa B. Cutler and F. W. Cutler, then co-partners doing business as the Cutler Manufacturing Company, hereinafter referred to as the licensees, covering a fruit grading machine known as the Cook Grader.

The elements of the contract which are relevant to this controversy are as follows:

I. (Contract, paragraph 1.) The patentee granted to the licensees the exclusive right to manufacture and sell the Cook Grader, with all modifications, alterations, improvements, including attachments thereto, and means of delivering or receiving fruits, sold in connection with the Cook Grader, for a term commencing May 1st, 1928, and ending September 30th, 1933.

II. (Contract, paragraph 1.) The licensees agreed, during the term of the license, not to manufacture any fruit grading machine of the same nature or used for the same purposes, except such as were then being manufactured by them.

III. (Contract, paragraph 2). The patentee agreed to diligently prosecute a reissue of the patent and granted to the licensees the exclusive right of manufacture and sale under such reissue.

IV. (Contract, paragraph 3). The licensees agreed to manufacture the Cook Grader, to make all necessary blue prints, patterns, jigs, and designs for such manufacture, which then became the property of the licensee. [45]

V. (Contract, paragraph 3). The licensees agreed that all Cook Graders should be manufactured from good materials and with good workmanship in keeping with approved methods of mechanical practice and manufacture.

VI. (Contract, paragraph 4). The licensees were bound to place the Cook Grader on the market and promote its sale and advertise it with the same diligence with which it promoted the sale of any other machines or products manufactured by them.

VII. (Contract, paragraph 5). All orders for graders obtained by the patentee at the date of the contract were assigned to the licensee, who assumed all obligations of the patentee and agreed to fill them promptly.

VIII. (Contract, paragraph 5). The licensees bought from the patentee all materials on hand.

IX. (Contract, paragraph 6). The licensees agreed to pay the following royalties:

a. 10% of the amount of the sale price of all equipment sold by the licensees, but not less than $50.00 for each fruit grader with a sizing portion of thirty feet or longer, and a minimum royalty for smaller machines in proportion to the length of the sizing portion thereof.

b. All royalties to be due and payable on May 1st, 1929, except that the sum of $300.00 thereof should be paid at the end of each calendar month for a period of twelve months. [46]

c. If on May 1st, 1929, royalties and commissions accruing, exceeded $3600.00 (the amount of the monthly advances) the licensees were at that time to pay the difference. If they were less than $3600.00, that sum should be considered as guaranteed royalties and commissions and the deficit not charged to the patentee.

d. Beginning May 1st, 1929, accruing royalties became payable at the end of each calendar month for all shipments and all deliveries made by the licensees during said month and within fifteen days prior to the end of the month.

e. The licensees obligated themselves to deliver to the patentee on or before the 15th day of each month a written statement showing the amounts of sales, made during the preceding calendar month, with the names and addresses of the customers, and

all equipment shipped and/or delivered during each month.

X. (Contract, paragraph 6). In addition to the foregoing, the licensees agreed to pay the patentee

a. A commission of 15% of the amount of all sales of Cook Graders and attachments in the Medford district during the year 1928.

b. A further sum of 15% on all sales of equipment to Henry E. Kleinsorge of Sacramento and the Earl Cook Company of California during the year 1928; provided, that the commission should not be paid on more than four Cook Graders sold to said purchasers. [47]

XI. (Contract, paragraph 7). In the event that the Commissions for the year 1928 and the royalties accruing to October 1, 1931, did not equal or exceed $15,000.00, the licensees agreed to pay such sum as might be necessary to bring up the total to $15,-000.00, PROVIDED that the licensees retained the option to withhold payment and cancel the contract by giving the patentee notice in writing to that effect.

XII. (Contract, paragraph 7). If the licensees did not pay the deficit last mentioned the patentee had the right at his option to cancel by giving ten days notice.

XIII. (Contract, paragraph 7). In the event of cancelation under XI and XII hereof, the licensees had no further right to manufacture or sell the Cook Grader, or any reissue thereof, or any im-

provements, alterations or modifications of the machine.

XIV. (Contract, paragraph 8). Breach by either party of the terms and conditions of the contract gave the other the right to cancel upon giving notice of the specified breach; provided, however, that the offending party should have thirty days after such notice within which to make good the breach.

a. Cancellation did not relieve the guilty party from liabilities then existing thereunder.

XV. (Contract, paragraph 10). On expiration or earlier termination of the agreement, the patentee obtained exclusive ownership of all improvements, attachments and designs relating to the Grader, or its attachments developed after the [48] date of the contract, irrespective of the party by whom made.

b. Patentable improvements made during the term of the agreement would be made by and at the expense of the patentee.

c. At the expiration or earlier termination of the contract, patentee had the option for thirty days to take over from the licensees all patterns, blue prints, jigs and designs relating to the manufacture of the devises, or the improvements or alterations thereon, at cost.

d. At the expiration or earlier termination of the contract, the patentee had the option for thirty days to take over from the licensees all machines and materials on hand at cost.

e. If the patentee did not exercise this option the licensees were given the right to complete machines in process of manufacture and sell such machines, and any others then on hand, not exceeding, however, ten machines in number, upon which the licensees agreed to pay the same royalties.

XVI. (Contract, paragraph 11). If during the term of the contract the licensees sold their business, the patentee had the option,

a. Either to require the purchaser to assume and discharge all of the licensee's obligations under the contract;

b. To cancel and terminate the agreement, put an end to the licensee's right thereunder, and prevent any [49] such rights passing to the purchaser.

So much for the contract.

The theory of plaintiff's bill, omitting the allegations as to his invention of the device, obtaining patent and like matters, is as follows: (The appropriate numbered paragraphs of the bill are set out in parenthesis in the following analysis).

A. (IV) That his device and the business he had developed in marketing it competed successfully and profitably with those manufactured by the defendant company.

B. (V) That to eliminate competition, the defendants Cutler solicited the license afterwards granted by the contract.

1. (VI) By representing that they controlled the fruit grading manufacturer and producting through their organization, and could and would

procure large scale production and sales of plaintiff's grader, and

2. That if plaintiff did not grant them a license they would place on the market a similar machine which would interfere with plaintiff's trade and nullify his patent rights.

C. (VII) Influenced thereby, plaintiff entered into the licensing contract.

D. (IX) That from the beginning the defendants Cutler intended to undermine and destroy plaintiff's machine and business and suppress his products, in order that they might [50] more easily market a machine belonging to them and their associates.

E. (XII) That upon obtaining the license the defendant Cutler changed the design of the Cook Grader, thereby impairing its efficiency and rendering the trade and demand therefor valueless to themselves and to plaintiff, thus limiting the amount of royalties and earnings which would accrue to the patentee.

F. (XIII) That after acquiring the license from the patentee, the defendants Cutler acquired the Palmer patent and thereupon built a machine differing from and less efficient than the Cook Grader.

G. (XV) That the defendants Cutler failed to furnish plaintiff with the monthly statements of sales required by the contract; that plaintiff has demanded but has not received them and therefore

does not know what machines have been sold and what royalties are due.

H. (XVI) That in November, 1929, the defendant Cutler incorporated the Cutler Manufacturing Company, Inc., which took over the business and assets of the Cutler partnership and the defendant Cutler became its executive officer.

I. (XVIII) That in the fall of 1929, or early in 1930, the Cutlers as copartners and the Cutler Manufacturing Co. Inc., merged with the defendant Food Machinery Company and F. W. [51] Cutler became and now is a director thereof and its statutory attorney in fact in the State of Oregon, and that the Cutler Manufacturing Company (sic) has since held itself out to be a division of the Food Machinery Corporation.

J (XIX) That on or about February, 1929, the defendant Food Machinery Corporation (then known as the John Dean Manufacturing Company) obtained the exclusive right to manufacture and sell a fruit grader known as the "Clear Fruit Grader", which was a machine competing with the Cook Grader. That the Cutlers participate in and share in such business and the profits thereof.

K (XX) That on July 26, 1930, the patentee served notice on all of the defendants requiring them to perform and observe the licensee contract which he had entered into with the Cutlers; that the defendants have refused so to do and thereby plaintiff has suffered and will suffer irreparable injury and damage.

L (XXII) That the acts of the defendants severally and in combination have caused and do cause irreparable damage to plaintiff, particularly by causing an impairment in the sale of his invention and in the royalties which otherwise would otherwise accrue therefrom. [52]

M. Relief. Plaintiff prays.

1. For an accounting of the royalties which have or should have accrued as the result of the sales;

2. A discovery from the defendants Cutler as to what fruit grading machines of the same kind and purpose as the Cook Grader were being manufactured by them prior to the execution of the contract;

3. That he be allowed damages alleged to have been suffered by reason of the acts of the defendants;

4. That the defendant company, individually and as partners, be enjoined from manufacturing any fruit grading machine competing with plaintiff's, except those which it was manufacturing prior to May 4, 1928;

5. That the Cutler Manufacturing Company, Inc., be held to be the assignee of the defendants Cutler, a co-partnership, and in that event it be enjoined in the same respects as the co-partnership;

6. That if the corporation be found not to be personally bound by the plaintiff's contract with the Cutlers, a co-partnership, it be enjoined from manufacturing any fruit grading machinery similar in nature and purpose to the Cook Grader.

7. That the Food Machinery Corporation be held to be the assignee of the exclusive rights of the Cut-

lers in the contract with plaintiff, and in that event it be enjoined from manufacturing any fruit grading machinery of the same nature [53] and purpose as the Cook Grader, except those which the Cutlers were manufacturing prior to May 4th, 1928.

8. That if the Food Machinery Company is to be personally bound by the terms of the original license agreement, it be enjoined from manufacturing any fruit grading machinery of the same nature and purpose as the Cook Grader, except as to such machines as were being manufactured by the Cutlers prior to May 4th, 1928.

9. That the patentee be declared entitled to all improvements, attachments and designs relating to the Cook Grader developed subsequent to May 4, 1928, whether made by the Cutlers or by plaintiff.

10. That plaintiff be decreed his costs and disbursements and have any further equitable relief as may be found proper.

The Master is clearly of the opinion and so finds that the allegations of the plaintiff herein mentioned under the head of B 1 and B 2 are not true as a matter of fact and if true are immaterial to the issues herein; that the allegations under the head of D are not sustained by the evidence and are in fact untrue; that any changes which were made by the defendant Cutler in the construction and design of the Cook Grader were made in good faith to overcome certain defects and difficulties that experience had disclosed and that in fact the improved Cook Grader [54] was not an inferior device, but ren-

dered equally as good results and avoided the defects in the original Cook Grader heretofore referred to; that while the defendants Cutler acquired the patent rights in the Palmer patent, they did so in good faith in order to avoid any possible suit for infringement and that it is not true that the machine known as the "Improved Cook Grader" was less efficient than "The Original Cook Grader."

The Master finds that the contract between plaintiff and the defendants Cutler was entered into in good faith between all the parties thereto, that it was not induced by fraud, misrepresentation, undue influence or other improper means; that the parties entered into its performance in good faith and at least until the latter part of 1929, or early in 1930, the defendants Cutler did nothing which could be questioned by Cook, and acted with entire openness and good faith toward him, and were not guilty of any breach of the contract. While it is true that the monthly statements were not rendered as in the contract provided, this occurred because of the seasonal nature of the business, the rush and congestion which existed at that time, and the delays in rendering the statements caused thereby, which were acquiesced in by Cook.

Cook's device disclosed invention of a high order and was peculiarly adapted to grading tender-skinned fruits, such as pears. Sizing of fruits is an essential process in packing; various machines were in the market, such as the Weight machine, but could not be successfully used in handling pears because

of the [55] fact that a slight pressure on the skin of the fruits injured the same, blemishing its appearance and finally causing decay. His device consisted of a moving belt to which was fastened an apron of duck or canvas upon which the fruits rode until it reached an aperture through which it fell into a receiving bin. An essential part of the device was the means by which these apertures could be increased or decreased in size. Cook accomplished this by a series of guide boards, which were inserted under the belt and against the apron, thus forming a continuous slot of varying size so that the smaller fruit dropped into the upper bin near the receiving end of the grader and the larger were carried by the belt until they reached the sized aperture which permitted them to fall into the bin. By means of set screws a delicate adjustment of the size of the apertures could be had.

Shortly after Cook built his first device a radical change took place in the packing business. The packers were required to remove the film of spray on the fruit by washing. Acid was used in the tank as well as the necessary re-agent. Although attempts were made to dry the fruit after being washed some moisture always remained on their surfaces. The canvas belt tended to become wet from the moisture of the fruit and stretch, and the acid caused the belt to rot. Difficulty was also experienced with belts working off the pulleys: the guide boards, which were wooden, and which were used to increase or diminish the size of the aperture and which were pushed out against the apron of the

belt, would at times splinter and tear [56] the apron. None of these defects were fatal and were of the kind that generally assert themselves in the development of any new device. The improved Cook sought to overcome these defects and in a large measure did so. A rubberized belt carried on a sprocket chain was used instead of the belt with the canvas apron; steel troughs were used instead of the wooden guide boards. Plaintiff contends that the rubberized belt was not as flexible and therefore inferior to the canvas apron, and that his type of guide board permitted a more delicate adjustment than the steel troughs later used. This is denied and the Master is of the opinion that the improved Cook overcame most of the defects of the original Cook and that in actual practice it rendered quite as satisfactory results.

The Sale of the Cutler Business.

The copartnership of Cutler Manufacturing Company was not the only manufacturer of fruit grading machinery on the Pacific Coast. The John Bean Manufacturing Company and several other concerns were in active competition with it. The John Bean Manufacturing Company had acquired the patent rights to the "Clear" fruit grader. At various times overtures had been made by the John Bean Manufacturing Company, (whose name was afterwards changed to Food Machinery Corporation) to the Cutlers to merge with that corporation, which had already absorbed various other competitors. The Cutlers for a long period of time declined to these offers. [57]

Late in 1929, however, they commenced to give heed to the proposal made by the Food Machinery Corporation and it was finally agreed that they would turn their business over to the Food Machinery Company and take stock for the purchase price. With this in view the Oregon corporation, Cutler Manufacturing Co., Inc., was organized; to it the defendants Cutler, doing business as the copartnership, transferred all of the assets of that copartnership. There is nothing to indicate that they did not intend to and did not attempt to transfer the Cook contract to the new corporation and the Master is of the opinion that they did so. Whether or not under the terms of the license they had power so to do without Cook's consent is another matter which the Master will discuss later.

The undisputed testimony, however, is that the Food Machinery Company declined to take over the contract on the Cook patent, at any rate unless Cook would consent that the purchaser be free from the obligations therein to manufacture and sell Cook Graders exclusively. Several reasons exist for this attitude, first the Food Machinery Company already had a license to manufacture and sell Clear Graders, a competing machine, and second, there was a serious question in their minds as to whether the Clear Grader was superior to either the Original Cook or the Improved Cook. They were, however, willing to take over the contract if the exclusive feature was eliminated and were willing, if Cook insisted, that the Cutler Manufactur-

ing division of their corporation, when the merger should be accomplished, [58] should handle only Cook Graders. The Plaintiff, however, refused to consent to any such modification. The Food Machinery Company therefore refused to take over the Cook contract. This, the Master believes, was entirely within its rights.

If, however, the defendants Cutler, or the Cutler Manufacturing Co. Inc., breached the contract with Cook, the question still arises whether or not he may follow the assets of the copartnership and the Cutler Manufacturing Co. Inc., into the hands of the Food Machinery Company. First, however, it becomes necessary to determine whether or not any such breach existed.

The Master has reached the conclusion that the facts which induced Cook to enter into a contract were as follows:

The copartnership, Cutler Manufacturing Company, had built a vigorous and successful business in the fruit handling machinery and was in a position to obtain by means of its sales organization a wider and more profitable market for the Cook Grader than Cook, with his limited means of financing and manufacture, was able to accomplish. However, he desired to protect himself against the license being assigned by reason of any incorporation of the copartnership, or the sale of its business to some other concern, which might not give the device the same attention which the Cutlers were able and were willing to give. For this reason the 11th and concluding paragraph was inserted in the contract.

The respondents contend that on a sale of the business, Cook was limited [59] to the remedies there specified. The Master, however, does not believe that this is an exclusive remedy or right. The Cutlers were bound for a term to manufacture and sell this product and to use all reasonable diligence and good faith in so doing.

If they sold their business to a purchaser who was satisfactory to Cook and was willing to assume the obligations of the contract, Cook would consent to the assignment; if the purchaser was unsatisfactory to him, or was unwilling to assume the obligations, he had the option to cancel and terminate the agreement and thereby terminate the rights and obligations of both the Cutlers under the license and prevent any attempted assignment from being effected. The Master is of the opinion, however, that Cook had no right or power to compel the purchaser of the balance of the Cutlers' business to assume the obligations of the contract, or compel it to take an assignment thereof from the Cutlers.

Cook attempted to do this, but the Master has reached the conclusion that such demand was ineffective. However, it is perfectly clear that he never released or intended to release the Cutlers from the obligations of the contract. And the remedy of cancelation provided for in paragraph 11 is purely cumulative and was exercisable at Cook's option and he could not be compelled by any act of the Cutlers to exercise that option. The Master, therefore, concludes that so far as the Cutlers are concerned the contract remained in force

and they have at all times been [60] bound to use diligence in the manufacture and sale of the Cook Grader and of the Improved Cook Grader.

It is the contention of the Respondents that paragraph 11 of the contract just adverted to, renders the contract unilateral and therefore if they sold their business, unless Cook was able to persuade the purchaser to take an assignment and assume the obligations of the contract, they were released. The Master finds himself unable to accept this proposition. Under the contract, Cook could not, by any act of his, nullify the effect of the license granted. The Cutlers obtained an exclusive license for the full period of the term. Cook's right to terminate was conditioned upon a contingency which could only arise by the voluntary and affirmative act of the licensees. If they sold their business, a new situation arose; they were not compelled to sell and they were not induced to sell by any act of the plaintiff. In the event they sold their business, the situation of Cook might then become very different and he might find himself faced with a situation unfavorable to his interest. One of the inducements to the contract was the fact that the Cutlers had built up a large trade in the fruit machinery field, they had an active sales organization and by giving the license to them Cook might reasonably expect that the Cutlers by the use of the good will they had acquired and of the sales organization which already existed, would materially enhance future sales of his products. A destruction of the business or the sales organization, or placing the

business in the hands of an unknown purchaser, might be detrimental to Cook's [61] interests. On the other hand, he might feel that such a sale and the assumption by the new purchaser of the burden of the contract would be advantageous. To safeguard himself, this clause was inserted in the contract and in the judgment of the Master it conferred upon the plaintiff the right to consider and determine whether he would hold the Cutlers or whether he would cancel the contract. The obvious reason for retaining the right to cancel, in the event that the purchaser was unsatisfactory or unwilling to assume the obligations of the contract, is that Cook might determine that the sale of the remainder of their business by the Cutlers would render it difficult for them to manufacture and sell the product as efficiently and in as great a volume as when they had other lines of fruit machinery business under their management. The plaintiff had the right to the benefits which in his opinion accrued to him by reason of the personal responsibility, character and ability of the Cutlers. As said by Lord Denman, "You have a right to the benefits you contemplated from the character, credit and substance of the party with whom you contract".

Humble vs. Hunter, 12 Adol. & E (Q.B.) 310

Wooster vs. Crane, 72 N. J. Eq. 23, 27

Arkansas Smelting Co. vs. Belden Co., 127 U. S. 379

The contract, as all the parties admit, involves the question of personal confidence in the capabil-

ities and integrity of the Cutlers. Unless, therefore, it contained a clause clearly giving the right of assignment, the Cutlers could not assign without the consent of Cook. In giving them the license, he relied [62] upon their ability and the good will which they had achieved in the business. A stranger might not have those abilities or be able to take the good will.

Corvallis Etc. R. R. Co. vs. Portland etc. Ry. Co., 84 Ore. 524, 538.

The Cutlers could not, therefore, substitute any purchaser without Cook's consent under the license agreement.

W. H. Barber Agency Co. vs. Co-Operative Barrel Co., 133 Minn. 207.

Wooster vs. Crane, 73 N. J. Eq. 22.

The Master's conclusions in this regard are: first, that the Cutlers could not compel Cook to consent to an assignment of transfer of the contract to any purchaser; second, that Cook never consented to any transfer or assignment to the Food Machinery Company unless that company would assume the obligations of the contract in toto. This the Food Machinery Company declined to do. When Cook refused to accept the Food Machinery Company's proposition to handle the Cook Grader along with the Clear Grader, or to have its Cutler Manufacturing Company division manufacture and sell the Cook, he was within his legal rights and did not breach the contract. But did this compel him then to exercise the option to cancel and terminate the

rights and obligations of the Cutlers under the license agreement.

As has been said, I am of the opinion that the provisions of paragraph 11 of the contract were merely cumulative to the rights which Cook would have had if that clause had been omitted. [63] Certainly without such a clause the fact that the Cutlers might have sold their business would not release them from the contract. Cook could insist that, notwithstanding any such sale, they proceed to the manufacture and sale of his grader, and that, on default, they respond for whatever damages he may have suffered by reason of such failure. An analysis of the contract convinces me that the clause 11 was inserted solely for his benefit and such seems to be the weight of authority.

In Kant-Skore vs. Sinclair, 30 Fed. (2d), 884 certiorari denied; 74 L. Ed. 1150, the Circuit Court of Appeals for the Sixth Circuit held as follows:

> "Clearly the provisions were inserted for the benefit of the licensor and not the licensee; they were designed to give him additional rights in case of its breach. He had the option to give or not give notice that the 'agreement shall be cancelled' at the expiration of sixty days; the licensee then had the right to avert the impending cancellation by repairing the breach. If it failed to do so within the specified period, what would be the result? The contract says 'then this agreement shall cease and determine'. Is the termination thereby

made automatic or is it again at licensor's option? Licensee is the wrongdoer; It has failed to avail itself of the opportunity to repair the breach. Unless the language compels the construction of automatic cancellation, thus giving the wrongdoer possible direct benefits, the clause will be held to confer a right only upon the other party, the licensor. In our judgment its true meaning is that the licensor may end the agreement, and the license but that despite the notice, he need not avail himself of this additional right; he may treat the contract as continuing in full force and effect."

As said in Western Union Telegraph vs. Brown, 253 U. S. 112,—

"The condition plainly is for the benefit [64] of the vendor, and hardly less plainly for his benefit alone, except so far as it may have fixed a time when Stewart might have called for performance if he had chosen to do so, which he did not. This being so, the word 'void' means voidable at the vendor's election, and the condition may be insisted upon or waived, at his choice.

"The fact that the contract contains a privilege of ending it at the election of the vendor for non-payment of the sum stipulated does not convert it into an option terminable by the purchasers at their will. Stewart v. Griffith, supra."

If the respondents' position is correct then, if a purchaser to whom they sold their business declined to assume the obligations of the Cook contract, Cook's only remedy would be to cancel. Then he would indeed have placed himself at the mercy of his licensee. Clause 11 was placed in the contract at Cook's instance. It is unlikely that he would have demanded a clause which would have put him at the mercy of his licensees and thus enable them at any time to avoid all liability by merely selling their business to a purchaser who would refuse to assume the obligations of the contract.

I construe clause 11 to mean that if the Cutlers sold their business Cook had the following options:

a. To consent to the assignment to the purchaser on condition that the latter assumed all the obligations of the contract, and if the purchaser declined so to do Cook could,— [65]

b. Insist that the Cutlers continue to perform; or

c. He could cancel and terminate the agreement.

Respondents insist with ability and ingenuity that clause 11 renders the contract unilateral because in the event of the sale of their business by Cutlers Cook could, at his option, cancel the agreement. It is, of course, axiomatic that unless both parties are bound by a contract, it cannot be enforced against either of them. Learned counsel cites the case of,—

> City of Pocatello vs. F. & D. Co. of Md., 267 Fed. 181.

This involved a contract between the city and a contractor to construct certain public improvements. It contained the provision, however, that if for any

reason the city failed to make sale of and receive the money on certain water works bonds then, at the option of the city, it could terminate the contract without being liable to the contractor. There was no obligation on the part of the city to sell the bonds, they might never have offered them for sale, there was no allegation that, before the demand for performance on the contractor, the city had sold the bonds and received the money. The contract in fact disclosed no obligation of any kind on the part of the city. So far as the city is concerned, the contract was purely executory and the conditions upon which it was bottomed might never come to pass. [66]

Such a situation differs vitally from the present case. By the contract here Cook gave an exclusive license effective in praesenti, except as to minor details, such as reissue of the patent and the defense of infringements. The license became effective at the moment plaintiff signed the contract. By no act of his could he shorten the term of the license. He had no general right to cancel at his pleasure and his option to cancel arose only under two circumstances, either upon breach by the licensee or by the sale of their business, the continued existence of which was one of the reasons inducing him to grant the license.

I will not unduly lengthen this report by a review of the cases cited by learned counsel. I have read them all but in none of them in my opinion was the option to terminate given to one party because of a change of condition resulting from the voluntary act

of the other. If for a valuable consideration I give a five year easement over my property to A, provided that if he sells the property to another, I may at my option revoke the easement, it cannot be said that such a contract lacks mutuality. As long as A keeps the property I cannot deprive him of the easement. If he sees fit to sell, it is his act, not mine, which may bring about the revocation. Being of the opinion that the sale of their business by the Cutlers to the Cutler [67] Manufacturing Company did not terminate the contract, the next question presented is whether or not by the sale the Cutlers were thereafter released and the corporation substituted in their place, or whether both the partnership and the corporation are bound by its terms.

I find that the contract was assigned by the partnership to the corporation and that the corporation assumed the burdens as well as the benefits thereof. I base this upon the testimony of F. M. Cutler and upon the minutes of the corporation. Defendants' Exhibit 8 recites that the president and secretary of the new corporation are "authorized and directed to execute in the name of the company and deliver to the Food Machinery Corporation all deeds, bills of sale or other instruments necessary to fully carry out the transfer of all of the real and personal property and the business of this corporation in accordance with the terms of the contract of purchase, excepting only from the transfer of the assets of this (Cutler Manufacturing Company, Inc.) Company, the interest of this company in the contract made, executed and delivered by and between Asa

B. Cutler and F. W. Cutler, partners doing business as Cutler Manufacturing Co., Portland, Oregon, and Floyd J. Cook, dated the 4th day of May, 1928, said omission of the interest of this corporation in said contract being by direction of the Food Machinery Corporation." On April 5th, 1930, Cutler Manufacturing Company, Inc., wrote the plaintiff giving notice that the Cutler Manufacturing Company, Inc. [68] had taken over the business and assets of the Cutler Manufacturing Co., a copartnership. (Plaintiff's Exhibit 12).

On this subject Mr. F. W. Cutler testified as follows:

> The MASTER: What was the purpose of writing to Mr. Cook this letter?
>
> A. Simply to advise him of our plans and what we were doing.
>
> The MASTER: Well, I know, but what right did you think that he had to know about this? You must have had some definite purpose in writing that letter.
>
> A. It was my idea that Mr. Cook would have the right to cancel his contract if we sold out.
>
> The MASTER: And if you didn't cancel it, then what?
>
> Mr. REILLY: You better let the lawyers argue the law on this.
>
> The MASTER: Well, I want to know what is in his mind.
>
> A. You will recall in my testimony this morning I said I discussed that matter with

Mr. Cook as to our incorporating, and he stated we merely incorporated to get out of the deal. We had incorporated in this case here——

The MASTER: Well, was the company——

A. ——but we didn't intend to get out of the deal.

The MASTER: In other words, the real purpose of this letter was to tell Mr. Cook——

A. He would have a right, if he wanted, to cancel it; it was up to him.

The MASTER: Yes, but if he didn't cancel it the Cutler Manufacturing Company——

A. I believe would have to carry it along. There was a matter of some doubt in our minds as to what would be the legal—we are not lawyers.

There is no direct evidence that Cook gave his assent to this assignment and no evidence that he consented to the substitution of the corporation for the individual liability of the Cutlers as copartners. However, both prior to the institution [69] of this suit and by the terms of his complaint he has at all times insisted that the corporation as well as the copartnership was bound to perform the contract and he seeks relief as to both. Ratification or confirmation has the same legal effect as an express prior assent. Cook's action in serving the notice of demand on both the Cutlers as copartners and upon the corporation, in my judgment constitutes such a confirmation and ratification of the act of assignment by the copartners.

This license contract demands on the part of the licensees, or their assignees, the rendition of services both in the manufacture and marketing of a product. It requires the licensee to use the same diligence in the sale of the Cook's Grader as they exercised in the marketing of their own device. It involves, therefore, the performance of duties which are not assignable in the true sense of the word, inasmuch as they involve a relationship of personal trust and confidence in the ability of the promissor, but they are delegable. When the copartnership assigned the contract to the corporation by the sale of its entire business and assets of the latter, the legal effect thereof was to delegate to the new corporation the performance of the copartnership's duties under the contract, and the assignment of the copartnership's rights thereto, namely to manufacture and sell the Cook Grader. (1 Williston on Contracts, par. 418, page 779).

The transaction did not constitute a novation releasing the Cutlers as copartners. Although Cook could have done so, there is no evidence from which any such complete novation can be inferred. [70]

> "One of the essential elements to a novation is that there should have been an extinguishment of the old debt and another is that there should have been a mutual agreement between all the parties that the old debt should become the obligation of the new debtor. 21 A. & E. Ency. of Law (2nd Ed.) 662; Kelso vs. Fleming, 104 Ind. 181 (3 N. E. 830). When the court found as it did in its fifth finding to the effect that the de-

fendants sold and transferred their hotel business to the corporation in payment for their stock; that as a part of the consideration therefor the corporation assumed and agreed to pay the obligations incurred by defendants in their hotel business, including plaintiff's claims; and that on May 6th, 1903, the corporation by virtue of its promise became liable for and agreed to pay plaintiff's demands—it expressly bases the consideration of the new promise upon the value of the goods and hotel business purchased, and thereby the court has impliedly excluded from being a part of that consideration the extinguishment of the defendants' obligation and the release of the defendants. It nowhere appears, expressly or by necessary inference, that the parties to the contract of sale intended that the defendants should be released from their obligation to plaintiff; but the only legal inference deducible therefrom is that the corporation was to be and become the principal debtor, and the defendants were to be and become the principal debtor, and the defendants were to be and become sureties in respect to the plaintiff's demands. * * * It nowhere appears as a fact found by the court that plaintiff ever agreed to or did release defendants, or that it was a part of the agreement of sale between defendants and the purchasing corporation that defendants were to be released by plaintiff. * * * There having been no agreement by plaintiff to release defendants, and no release by plaintiff there

could not have been a novation in law as found by the court."

Miles vs. Bowers, 49 Ore. 429, 432, 433, 435.

[71]

"It is well established that to constitute a novation by the substitution of the debtor, the contract so to do must be the result of the concurrence and consent of all parties interested, namely, the original debtor, the new debtor, and the creditor. The mere agreement of Bullis to assume the indebtedness of the logging company, would not, of itself, constitute a novation. There would still remain the essential requisite that the canning company consented to such decision and looked solely to him for payment. It would be possible to add Bullis as an additional debtor and still hold the canning company liable. Under such circumstances there would be no novation. One of the essential elements, therefore, is that there must be a release of all claim or liability against the original debtor; Miles vs. Bowers, 49 Ore. 429 (90 Pac. 505); 20 R. C. L. 369 and numerous authorities cited in exhaustive notes, L. R. A. 1918 B, 113."

Vawter v. Rogue River Valley Canning Co., 124 Ore. 94, 99.

I therefore state my conclusion of law,—that by the assignment of the Cutler Manufacturing Co., Inc., the copartners remained bound and Cook had the right to demand performance both by the mem-

bers of the copartnership and by the new corporation as well.

However, as heretofore stated, I find as a fact that the Food Machinery Company never became the assignee of the contract from the corporation, nor did it assume any of the obligations therefor and that no relief can be granted against it, except that in my judgment the court should retain jurisdiction over the Food Machinery Company so that in event the Cutlers or the Cutler Manufacturing Co. Inc., do not satisfy the decree against them the assets of the Cutler Manufacturing Company may be pursued into the hands of the Food Machinery [72] Company. This recommendation is based upon the fact that the Food Machinery Company has received all of the assets of the Cutler Manufacturing Company, Inc., and issued its stock in payment thereof. It did this with full knowledge of the existence of the Cook contract and that it had been acquired by the Cutler Manufacturing Company, Inc., and it must be presumed that it knew the obligations and burdens of that contract.

The findings and conclusions thus reached make necessary first,—the assessment against both F. W. and Asa B. Cutler, the original licensees, and the Cutler Manufacturing Co., Inc., of the damages, if any, suffered by Cook through their failure and refusal to perform the contract; and secondly, an accounting as to royalties and commissions.

It is clear from the record that from and after the sale of their business to the Cutler Manufacturing Co., Inc., neitehr they nor the corporation made

any pretense of performing the contract. It is true that several graders were assembled or sold subsequent to that time, but this was done under their belief that the sale terminated this license contract and that plaintiff, not having elected to take over the jigs, patterns, etc., under clause 10 of the contract, the right remained in them to sell not more than ten graders assembled or to be assembled from parts on hand.

The testimony clearly establishes that since January 1st, 1929, the demand for Cook graders has decreased very materially. [73] This is in part due to the fact that in some districts the market was to a large degree saturated, and second, that business conditions, particularly in the fruit raising districts, became such that prospective buyers were financially unable to purchase. How many graders could have been sold by the exercise of due diligence is difficult, if not impossible, of ascertainment. This difficulty, however, is not Cook's fault. He had granted an exclusive license to the defendants Cutler, he retained no right to manufacture or sell. The defendants Cutler and the Cutler Manufacturing Co., Inc., made no attempt to develop the market or sell the machine, believing that they were no longer under any obligation so to do. It would, however, be most unjust and inequitable to permit the licensee to escape liability for the breach of his contract because of the difficulty of proving ensuing damages occasioned by the breach.

An examination of the volume of sales made during the period when the Cutlers were actively per-

forming the contract and the evidence furnished them as to the number of fruit graders of the various kinds sold after their breach, leads me to believe that these damages may be approximated with reasonable certainty. Defendants' exhibit 10 is a graph, showing first, the amount in dollars and cents of the sales of all graders; second, in the upper diagram, commencing with the year 1928, the amount of sales of graders, except Cook's, down to and including the end of the year 1931, and third, the amount of Cutler's sale of Cook Graders commencing with the first of 1928 down to and including the end of the year 1930. The lower graph of the exhibit shows the number [74] of the different graders sold, the upper line indicating the total amount of graders of all kinds sold from 1925 to the end of 1931, and the lower line showing the number of Cook Graders sold by the Cutler Manufacturing Company.

The total sales of fruit graders of every kind sold in the year 1928 amounted to $47,445.30. Of this amount the Cutler Manufacturing Company sold $19,558.15 worth, or approximately 41% of the entire volume of sales.

In 1929 the total sales of fruit graders was $36,-808.48 of which $22,393.48 were Cook Graders, or about 61%.

In 1930 twenty-six fruit graders of all kinds were sold. Six of these were Cook Graders, but it is to be remembered that in 1930 the Cutlers were only attempting to sell enough Cook Graders to clean

up their stock of parts on hand. The gross sales of all graders amounted to $18,416.63.

In 1931 no Cook Graders were sold, but the gross sale of other competing graders amounted to $21,-660.00. It is fair to assume that had the licensees and their assigns, the Cutler Manufacturing Co., Inc., used the same diligence in 1931 that they had in previous years the sales of the Cook Grader would have amounted to at least 40% of the total sales of graders.

As to the number of graders sold, the Master has computed the following percentage from Exhibit 10:

Year	All Makes	Cook Graders	Percentage of Cook Graders to Total Sales
1928	107	28	26%
1929	42	22	52%
1930	26	6	18.7%*
1931	20	—	— [75]

*In 1930 the only effort of the licensees was to sell the graders the parts of which were on hand. Therefore this percentage is relatively unimportant.

I find that it is a fair inference that in 1930, had the defendants F. W. Cutler, Asa B. Cutler and the Cutler Manufacturing Co., Inc., exercised reasonable diligence they could have sold 17 machines. In that regard I infer that in that year they could have sold at least 40% of the sales. Their competitors sold 26 machines. That represented 60% of the market and the total amount of machines that

could have been sold would be 43, and 40% thereof would be 17. The Cutlers, however, sold only 6. Therefore as to that year Cook's damage, using the minimum royalty of $50.00 per machine, would be $850.00. In 1931, using the same method of computation, they could have sold 13 machines, or a royalty loss of $650.00.

I am not unmindful of the provisions of the 7th paragraph of the contract which declares that in the event the commissions for the year 1928 and the royalties accruing under the contract to October 1st, 1931, do not exceed the sum of $15,000, that then the company on October 1st, 1931, shall pay to Cook such sum as shall be necessary to bring the total up to $15,000, provided that the company shall have the option to withhold payment of such deficit and cancel the contract by giving Cook notice in writing to that effect. The evidence clearly establishes, however, that Cook had actual knowledge in [76] 1930 that both the Cutlers as individuals and the Cutler Manufacturing Company, Inc. had disaffirmed the contract; that they looked upon it as terminated; that they did not intend to and refused to further perform it in any respect then or at any time in the future. For this reason I believe that, under the 7th clause of the contract, the period for which Cook can recover damages terminated on October 1st, 1931.

There is, however, an additional element of damage which I believe should be considered. By reason of the failure of the licensees to perform, the Cook Grader has been taken from the market. Common

experience, fortified by the provisions of the contract itself, indicates that the advertisements, developments and sales efforts of the licensees of the machine were essential to the successful performance of the contract. It is a matter of importance in marketing any device that the sales efforts and advertisements be continuous in order that the goodwill of the business may be maintained and the purchasing public informed of the existence of the device, its merits and where it can be purchased. When sales efforts cease, the resultant damage is far greater than the loss of any individual sale, because it involves the destruction of the entire market, not only for the particular period but for the future, and requires the expenditure of much money and time to rebuild the demand for the device. I believe and find such resulting damage is substantial and real and that the innocent party should be made whole as far as may be possible. [77] I am not unaware that the assessment of damages of such character closely borders on speculation, but I am of the opinion that an allowance may properly be made for it. I therefore find and allow the additional sum of $5,000 as such damages.

In arriving at an accounting of the royalties and commissions to which plaintiff may have been entitled, consideration must be given to the following phases:

1st. Cook was to receive a 10% royalty on the amount of the sales price of all equipment sold;

(a) A minimum royalty of $50.00 was prescribed

for each grader with a sizing portion of thirty feet or longer.

(b) A proportionate minimum for smaller machines.

2nd. A further commission of 15% on the amount of all sales of Cook Graders and attachments in the Medford district during the year 1928.

3rd. A further commission of 15% on all sales of equipment to Kleinsorde at Sacramento, California, and the Earl Fruit Company, not exceeding four Cook Graders.

4th. If the royalties and commissions earned up to May 1st, 1929, were less than $3600.00, Cook was to receive that amount notwithstanding.

5th. If the total royalties accruing to October 1st, 1931, did not exceed $15,000, the licensees were bound to pay the difference, but had the option of withholding such payment and cancelling the contract by giving written notice to that effect. [78] In the event of failure to pay the $15,000 the licensee had the right at his option to cancel the contract.

6th. In addition to the foregoing, an oral agreement was entered into whereby Cook was to receive commissions on sales made in the Medford district during the year 1928 on all equipment manufactured or sold by the copartnership. As to the terms of this agreement the parties are not in accord. The Cutlers claim that Cook was entitled to receive a commission on those sales only, orders for which he had obtained personally, or which were the direct result of his efforts. Cook, on the other hand, con-

tends that he was made general sales representative of the Cutlers of the district in question, that he was to receive the commission on all sales made in that district during the year, and that he personally solicited all of the concerns who had occasion to use the kind of equipment handled by the Cutlers, requesting them to make all their purchases from the co-partnership, and assuring them that it would be of direct benefit to him because he would receive a commission irrespective of whether or not he personally obtained the orders. The testimony on this subject is not entirely satisfactory. It is apparent that the Cutlers in fact allowed Cook a commission on all orders as to which they believed he was the inciting cause. Their testimony, however, is not clear and certain as to the exact details of the agreement, while that of Cook in that regard is definite.

While I am not entirely satisfied on the subject, I am constrained to find that the oral contract was as claimed [79] by Cook. This finding, however, is only important on the question of whether, as the Cutlers claim, Cook was overpaid and they are therefore entitled to a credit for this overpayment.

In the accounting Plaintiff makes claim for royalties on all parts and replacements used on Cook Graders, such as additional belting, canvas curtains, and the like. As a matter of law, the Master has reached the conclusion that he is not entitled to royalties on such items. The 6th paragraph of the contract provides for a royalty of 10% on the amount of the sale price of all equipment sold by the

company. This language might be stretched to include the sale of repair and replacement parts, although it would in my judgment be a strained construction of the language used, inasmuch as the purchaser of a patented device has the right to go into the open market and purchase any necessary parts to repair or replace the machine without payment of any royalty, unless the parts themselves are patented. This patent is a combination patent and it is not claimed that the patentee invented the parts. His invention consists of combining in a new arrangement, thereby obtaining new results, well known mechanical parts and principles, and even if the Cutlers had not received a license from Cook they could have sold such repair and replacement parts without infringement. However, the clause in question is modified by the succeeding clause, which reads as follows: [80]

> "it being understood that under no circumstances shall the royalty payable to the second party hereunder be less than $50 for each fruit grader with a sizing portion of thirty feet or longer, with a minimum royalty for smaller machines in the ratio of the sales price of such smaller machine to the sales price of such machines with a sizing portion of thirty feet or longer."

I construe this royalty clause as being limited to the sales of complete machines, which include as part of the equipment the connecting link, a moving belt which delivers the fruit to the grader. I have

therefore disallowed plaintiff's claim to royalties upon the sale of repair and replacement parts.

Plaintiff further claims royalties upon various attachments not covered by the patent which are often sold and used in connection with the grader, such as off-grade return belts, sorting tables and the like. They are not parts of the Cook Grader. They are used in packing houses which do not use Cook Graders, and I can see no more reason for allowing royalties as to them than for the washing machine which may be and generally is placed at the head of a Cook Grader and from which the washed fruit is delivered to the connecting link and thence to the grader itself. I have therefore disallowed all claims upon such devices as not being within the license contract.

Upon the accounting I find that defendants' Exhibit 3 states an accurate account between the parties, except in the following particulars:

1. It omits certain items of commissions provided in the contract amounting to $109.69. [81]

2. It omits numerous items of commissions earned outside of the contract, amounting to $291.53.

3. There is an item of $3.22 charged against Cook under date of February 25, 1929, which in my judgment is not proper.

4. Cook is entitled to a 10% royalty on the amount of $75.00 charged as engineering expense on the sale of the grader to the Oxnard Citrus Association. I do not believe that this is a proper deduction from the invoice price so far as Cook is concerned.

Detailed statements of the first and second items above mentioned are hereto attached, marked Exhibits A and B.

The Master states the following as the true account between the parties:

May 1st, 1928 to May 1st, 1929.

Royalties and commissions earned under contract, Defendants' Exhibit 3	$4564.23	
Additional items allowed by Master	102.19	$4666.42
Commissions earned outside of contract, Defendants' Exhibit 3	$1245.04	
Additional items allowed by Master	291.53	$1536.57
		$6202.99
Payments to Cook shown by Defendants' Exhibit 3	$6754.98	
Disallowed by Master	3.22	$6751.76
Overpayment to Cook		$ 548.77

[82]

May 1st, 1929 to December 31st, 1929.		
Defendants' Exhibit 3	$1598.85	
Additional amount allowed invoice 30-080	7.50	
1930 Exhibit 3	809.16	
Earned on Oxnard sale	7.50	$2423.01
Total payments		$2749.43
Overpayment to Cook		$ 326.42
Overpayment to May 1st, 1929		$ 548.77
Total overpayment to Cook		$ 875.19

The defendants Cutler and the Cutler Manufacturing Company are entitled to a credit in the amount so found as an offset against the damages allowed by the Master.

The Master recommends the following decree be entered in this case:

First. That no relief be given the plaintiff against the Food Machinery Company;

Second. That plaintiff have judgment against the defendants F. M. Cutler and Asa B. Cutler as co-partners, and the Cutler Manufacturing Co., Inc., in the amount of $6400 as to which they have a claim for overpayments of $875.19, leaving a net amount of $5520.81, and that he have and recover his costs against these defendants. [83]

The Master was engaged for a period of fourteen days in taking testimony in this case, and two days

in hearing argument of counsel. He has been engaged ten days in the consideration of the testimony, the briefs of counsel and in the preparation of his report. He has incurred $25.00 traveling expenses. He prays that his disbursements may be allowed and that the court fix his compensation in the premises and order the payment of them as so allowed. He transmits with his report three volumes of testimony, consisting of 1106 pages, and the exhibits filed by the respective parties as noted in the transcript. He further transmits to the court the briefs submitted by counsel.

Respectfully submitted,

ROBERT F. MAGUIRE,

Master in Chancery. [84]

EXHIBIT A.

Invoice	Customer	Corrected Amount	Difference in Cook's Favor
9464	Kleinsorge	$93.75	$29.94
9502	Pinnacle Pkg Co.	28.50	28.50
9583	Kleinsorge	114.60	29.25
10024	Apple Growers Ass'n	145.00	14.50
30080		315.00	7.50
			$109.69

[85]

EXHIBIT B.

Invoice	Customer	Corrected Amount	Difference in Cook's Favor
9497	Hearty	19.80	19.80
9547	Van Hovenburg	22.80	22.80
9606	Sgobel & Day	.09	.09
9623	Steinhardt & Kelly	.71	.71
9630A	E. W. J. Hearty	.58	.58
9634	"	4.50	4.50
9646	"	1.08	1.08
9674	Suncrest Orchards	.60	.60
9675	Steinhardt Kelley	1.20	1.20
9676	Sgobel & Day	.60	.60
9677	Newbey & Son	.48	.48
9691	E. W. J. Hearty	.18	.18
9694	Sgobel & Day	.52	.52
9732	Amer. Fruit Growers	9.00	9.00
9745	Medford Ice & Cold Stor	14.50	14.50
9767	E. W. J. Hearty	22.69	22.69
9776	Medford Ice & Cld Stor	20.29	20.29
9815	Ind. Pkg Co	.28	.28
9822	Am. Fruit Growers	.10	.10
9834	Palmer Corp	.11	.11
9856	Rogue River Co.	1.35	1.35
9875	" " Valley C. Co.	27.36	27.36
9989	E. W. J. Hearty	22.69	22.69
9904	Steinhardt & Kelly	3.04	3.04
9905	Newbey & Sons	3.04	3.04
9906	Sgobel & Day	3.04	3.04
9907	Pinnacle Pkg Co	3.04	3.04
9908	E. W. J. Hearty	2.04	2.04

Invoice	Customer	Corrected Amount	Difference in Cook's Favor
9909	Sgobel & Day	.52	.52
9910	Steinhardt & Kelly	.54	.54
9925	Del Rio Orchards	2.39	2.39
9926	Sgobel & Day	.36	.36
9927	" "	.86	.86
9937	E. W. J. Hearty	6.75	6.75
9952	Newbry & Son	.78	.78
9953	Steinhardt & Kelly	1.14	1.14
9972	Rogue River Co	1.43	1.43
9986	E. W. J. Hearty	.58	.58
10000	Sgobel & Day	3.04	3.04
10024	Sgobel & Day	.34	.34
10062	C. A. Knight	.70	.70
10063	Pinnacle Pkg Co	3.06	3.06
10065	Del Rio Orchard	1.26	1.26
10086	E. W. J. Hearty	10.80	10.80
10087	Del Rio Orchards	.18	.18
10088	C. & E. Fruit Co.	9.85	9.85
			[86]
Forward		$228.25	$228.25
10095	Am. Fruit Growers	4.35	4.35
10137	Sunset Orchards	3.07	3.07
10140	C. & E. Fruit Co.	3.04	3.04
10151	C. & E. Fruit Co.	.56	.56
10162	Rogue River Co.	.41	.41
10176	C. & E. Fruit Co.	3.46	3.46
10180	C. & E. Fruit Co.	3.04	3.04
10187	Growers Exchange	1.75	1.75
10188	Growers Exchange	.76	.76

Invoice	Customer	Corrected Amount	Difference in Cook's Favor
10189	C. A. Knight	3.04	3.04
10190	Sgobel & Day	3.04	3.04
10218	E. W. Hearty	1.80	1.80
10266	Independent Pkg. Co.	3.04	3.04
10342	E. W. J. Hearty	2.23	2.23
10343	Steinhardt & Kelly	2.87	2.87
10344	C. & E. Pkg. Co.	2.67	2.67
10345	C. A. Knight	.29	.29
10346	Suncrest Orchard	1.81	1.81
10347	Independent Pkg. Co.	1.62	1.62
10348	Sgobel & Day	1.93	1.93
10476	Am. Fruit Growers	.42	.42
10477	C. & E. Fruit Co.	.52	.52
10478	Sgobel & Day	.94	.94
10527	E. W. J. Hearty	1.12	1.12
10599	C. & E. Fruit Co.	3.08	3.08
10627	Steinhardt Kelly	.56	.56
10628	Pinnacle Pkg. Co.	1.43	1.43
10717A	Sgobel & Day	1.47	1.47
10718	C. & E. Fruit Co.	3.04	3.04
10719	Pinnacle Pkg. Co.	.73	.73
10730	E. W. J. Hearty	3.15	3.15
		$291.53	$291.53

[Endorsed]: Filed March 31, 1933 [87]

AND AFTERWARDS, to wit, on the 14th day of June, 1933, there was duly filed in said court, Exceptions of Plaintiff to Master's Report, in words and figures as follows, to wit: [89]

[Title of Court and Cause.]

PLAINTIFF'S EXCEPTIONS TO MASTER'S REPORT

Comes now the plaintiff, within the time allowed by the orders of the court, and presents and files these his exceptions to the report of Hon. Robert F. Maguire, Master in Chancery, heretofore filed with the clerk of this court. In these exceptions plaintiff accepts as true all findings of fact made by the Master, and these exceptions are based solely upon assertions, first, that the Master's conclusions do not follow from the facts specifically determined, and, second, that the Master has erred as a matter of law in the interpretation of a certain written contract.

Plaintiff respectfully submits that the report is in error in the following particulars: [90]

EXCEPTION I

1. The report is in error in that the Master has applied an incorrect interpretation of the contract of May 4, 1928, (see Exhibit I, attached to answer of F. W. Cutler and Asa B. Cutler) and in particular of paragraph Seventh of said contract.

2. The Master has construed the acts of the defendants F. W. Cutler and Asa B. Cutler in sell-

ing their business to Food Machinery Company, in 1930, as the equivalent of cancellation of said contract of May 4, 1928, under the provisions of paragraph Seventh thereof (Report, pp. 33, 34). Plaintiff asserts that the acts of said defendants in disposing of their business and ceasing to perform their obligations under the contract of May 4, 1928, did not constitute a cancellation within the meaning of said paragraph Seventh. As a consequence defendants F. W. Cutler, Asa B. Cutler and Cutler Manufacturing Company, Inc., on account of their breaches of the contract of May 4, 1928, are liable to plaintiff in an amount, based upon facts found by the Master, shown in the following table:

(a) Difference between the sum of $15,000.00 and $9,501.19 royalties actually paid up to October 1, 1931, ($6,751.76 plus $2,749.43; Report, pp. 39, 40) payable on October 1, 1931, under terms of said paragraph Seventh,	$ 5,489.81
(b) General damages resulting from destruction of market for plaintiff's machine caused by failure of defendants to perform their obligation under the contract to produce and market plaintiff's machine, being the same element and in the same amount as determined by the Master (Report, pp. 34, 35),	5,000.00

[91]

(c) Estimated royalties on additional machines which would have been sold between October 1, 1931, and September 30, 1933, had defendants performed their obligations under the contract of May 4, 1928, (Estimated on basis used by Master, Report, p. 33. 30 machines during the 2-year period, or 15 machines per year, at $100. average royalty per machine—See Exception II),	$ 3,000.00
Total	$13,498.81

3. The result of a correct interpretation of the contract, applying the facts as found by the Master, is that plaintiff is entitled to recover $13,498.81 instead of $5,520.81, recommended by the Master.

In the event that Exception I is disapproved, plaintiff makes the following

EXCEPTION II

1. The report is in error in that the amount recommended by the Master for damages consisting of estimated royalties on machines which would have been sold by defendants in 1930 and 1931, had defendants performed their obligations under said contract of May 4, 1928, (see item (a), paragraph 2, Exception III) is arrived at by the use of the $50.00 minimum royalty specified in said contract of May 4, 1928. To be statistically correct the

amount of this item should be determined by use of average royalties paid by defendants on machines sold by defendants in 1929 and 1930. Said average is in excess of the minimum royalty and is not less than $100.00 per machine.

2. The result of the use of the average royalty in [92] place of the minimum royalty, based on the facts found by the Master, is shown in the following table:

(a) Estimated royalties on additional machines which would have been sold by defendants in 1930 and 1931, had defendants performed their obligations under the contract of May 4, 1928 (See Report, p. 33)		
17 machines in 1930 at $100.00,	$1,700.00	
13 machines in 1931 at $100.00,	1,300.00	$3,000.00
(b) Other damages found by Master (Report, pp. 34, 35),		5,000.00
Total		$8,000.00
(c) Credit overpayments to plaintiff found by Master (Report, p. 40),		875.19
Net Total		$7,124.81

3. To correct only for the erroneous use by the Master of the $50.00 minimum royalty in place of

the correct average royalty of not less than $100.00, the amount of $5,520.81 found by the Master should be increased to $7,124.81.

In the event that the foregoing Exceptions I and II are overruled, plaintiff makes the following

EXCEPTION III

1. The report is in error in that the sum of $5,520.81 recommended by the Master as the amount of the judgment to which plaintiff is entitled (Report, p. 40), is insufficient to the extent of $104.00, as the result of two arithmetical errors made by the Master.

2. The said arithmetical errors occur in the following [93] manner:

The sum of $5,520.81 is derived by the Master in the manner shown in the following table:

(a) Estimated royalties on additional machines which would have been sold by defendants in 1930 and 1931, had defendants performed their obligations under the contract of May 4, 1928,	$1,400.00
(b) Other damages (Report, pp. 33, 34),	5,000.00
Total	$6,400.00
(c) Credit overpayments to plaintiff (Report, p. 40),	875.19
Net Total	$5,524.81

The first arithmetical error is that the Master computes the net total as $5,520.81 instead of $5,-524.81, an error of $4.00.

The second arithmetical error is that the Master uses for item (a) in the foregoing tabulation $1,-400.00, whereas the components of said item (a) of $850.00 and $650.00 (Report, p. 33) total $1,500.-00, an error of $100.00.

3. To correct only the arithmetical errors the total of $5,520.81 stated by the Master should be increased by $104.00 to $5,624.81.

WHEREFORE, plaintiff prays that these exceptions may be heard by the court and that the report of the Master be corrected in the respects designated in the foregoing exceptions, and that plaintiff shall have judgment against defendants F. W. Cutler, Asa B. Cutler and Cutler Manufacturing Company, Inc., in the sum of $13,498.81, together with his [94] costs against said defendants; and further that if said defendants fail to satisfy said judgment, the assets formerly owned by said defendants and transferred to defendant Food Machinery Company may be pursued into the hands of said Food Machinery Company.

OMAR C. SPENCER
FLETCHER ROCKWOOD
CAREY, HART, SPENCER & McCULLOCH

[Endorsed]: Filed June 14, 1933. [95]

AND AFTERWARDS, to wit, on the 15th day of June, 1933, there was duly filed in said Court, Exceptions of Defendants Asa B. Cutler and Frank W. Cutler to Master's Report, in words and figures as follows, to wit: [96]

[Title of Court and Cause.]

EXCEPTIONS TO MASTER'S REPORT.

Come now defendants, Asa B. Cutler and Frank W. Cutler, and Cutler Manufacturing Company, Inc., a corporation, and except to the report of Robert F. Maguire, Esq., the Standing Master, filed in this cause on the 31st day of March, 1933, and for cause of exception show:

I.

That the Master has at pages 22 and 23 of his report erroneously and incorrectly interpreted the contract of May 4, 1928 between plaintiff and defendants, F. W. Cutler and Asa B. Cutler, copy of which is attached to the answer of Asa B. Cutler and F. W. Cutler, and Cutler Manufacturing Company, Inc., a corporation, and has based his recommendation [97] for a recovery against these excepting defendants upon said erroneous interpretation of said contract. The particular error in interpretation asserted by these defendants is that the Master interpreted section 11 of said contract as giving to the plaintiff his choice of three options:

1. In the event of a sale of the business of Asa B. Cutler and F. W. Cutler, a partnership, to make an agreement with the purchaser by which

the purchaser assumed all of the obligations of said contract.

2. Notwithstanding such a sale, to require these excepting defendants to continue full performance of said contract, and

3. To cancel the contract in its entirety whereas these excepting defendants assert that said contract gave to plaintiff in the event of the sale of the business of Asa B. Cutler and Frank W. Cutler, a choice of two options only:

1. To agree, if he could, with the purchaser that the purchaser would assume all of the obligations of the contract, or

2. To cancel and determine the contract in its entirety except as to the part already performed.

In presenting this exception these excepting defendants will refer to the contract of May 4, 1928, and to the testimony of F. W. Cutler, pages 898-900 of the transcript of testimony transmitted to the Court by the Master.

II.

That the Master has at pages 23-29 of his report rejected the contention of these defendants that the provisions of Section 11, if construed as giving to plaintiff alone an [98] option to cancel in the event of a sale of the business of Asa B. Cutler and F. W. Cutler, were void for lack of mutuality.

III.

The Master found at page 29 of his report that upon the sale of the business of Asa B. Cutler and

F. W. Cutler to Cutler Manufacturing Company, Inc. the partners remained bound and plaintiff had a right to demand performance both by the partnership and by Cutler Manufacturing Company, Inc., whereas there was no testimony of any exercise by plaintiff of any option to which he was entitled under said contract of May 4, 1928.

IV.

In computing the damages against these excepting defendants the Master at pages 32-33 of his report assumed that, if these excepting defendants had continued full performance of said contract of May 4, 1928 during the years 1930 and 1931, they could have sold Cook graders to the extent of forty per cent of the total fruit graders sold by the whole manufacturing trade during those years, and that the total number of machines sold represented only sixty per cent of the market so that these excepting defendants could and would have sold not only forty per cent of all fruit graders actually sold by the whole trade but also forty per cent of a theoretically larger market presumably to be created by the efforts of these excepting defendants. These excepting defendants assert that there was no evidence that the total market would have been any greater, or the total number of machines sold by the whole trade any greater during 1930 and [99] 1931 if these excepting defendants had continued in full performance of said contract of May 4, 1928.

V.

The Master has found in his report at pages 34 and 35, in computing damages against these excepting defendants, that the sum of $5,000.00 should be included for loss of good will or prestige of the Cook Grader due to the cessation of advertisements and sales efforts by these excepting defendants. These excepting defendants assert that there was no evidence received from which any value could be placed upon this alleged good will, or as to the amount of money and time necessary to rebuild it, if it was in danger of loss, or was lost, and the allowance of said amount is based not on the record but upon speculation and conjecture. Moreover, the Master found at pages 33-34 of his report that the evidence clearly establishes that plaintiff had actual knowledge in 1930 that both the Cutlers, as individuals, and the Cutler Manufacturing Company, Inc., had disaffirmed the contract, and therefore had ample opportunity to protect the good will of his Cook Grader by advertisements and sales efforts of his own. The date of such disaffirmance was in January, 1930, as disclosed by the testimony of the plaintiff Cook at pages 563 and 565 of the transcript of testimony.

VI.

The Master, in stating the account between the plaintiff and these excepting defendants, found at pages 36 and 37 that there was an oral contract outside and independent of the contract of May 4, 1928, that the plaintiff Cook should act as a gen-

eral sales representative of defendants, Asa B. Cutler and F. W. Cutler in the Medford district, and at page 39 found [100] that the accounting submitted by Asa B. Cutler and F. W. Cutler on the hearing omitted numerous items of commissions earned by the plaintiff Cook outside of the contract involved in this suit, amounting to $291.53, and he allowed plaintiff Cook credit in the account for that sum. At page 36 of his report he found that in stating the account between the plaintiff Cook and defendants Asa B. Cutler and F. W. Cutler under the contract of May 4, 1928, involved in this suit, the Cutlers had also allowed Cook "a commission on all orders as to which they believed he was the inciting cause." These excepting defendants assert that whether or not Cook had an outside oral contract with Asa B. Cutler and F. W. Cutler, and whether Cook was fully paid under said outside contract, is immaterial in this suit, not being pleaded or relied on in the complaint, that the Master was powerless to make any finding as to whether the Cutlers had paid to Cook the full amount due under said outside contract, and that in stating the account between the parties under the contract of May 4, 1928, involved in this suit, the Master's inquiry as to the outside contract should have been limited to an inquiry as to what the Cutlers actually had allowed Cook under said outside contract, the balance of the payments to him being applicable to the contract of May 4, 1928, and not what the Cutlers should have allowed Cook.

VII.

The Master recommended at page 40 of his report that plaintiff recover his costs against defendants, F. W. Cutler and Asa B. Cutler, as co-partners, and Cutler Manufacturing Company, Inc., whereas approximately two-thirds of all of the hearing before the Master consisted of the unsuccessful attempt of the plaintiff to prove the allegations of the complaint that [101] there was a conspiracy on the part of all of the defendants to eliminate competition, that the defendants Cutler intended to undermine and destroy plaintiff's machine and business and suppress his products and to impair the efficiency of the machine so as to make it unsuitable for fruit grading, that the Cutlers coerced plaintiff into making the contract of May 4, 1928 by threats to interfere with plaintiff's trade, and nullify his patent rights, that the Cutlers, under the pretense of making improvements in the Cook Grader, made changes in it which did in fact decrease its efficiency and value in the trade, all of which issues were found against plaintiff by the Master and found to be wholly unsupported. With the elimination of the charges so unjustifiably and unnecessarily made the case would have been a simple one, requiring approximately one-third of the time which the Master was actually compelled to devote to the case, and this fact renders it inequitable to assess all the costs against these excepting defendants.

WILSON & REILLY,
Solicitors for Defendants.

[Endorsed]: Filed June 15, 1933. [102]

AND AFTERWARDS, to wit, on the 15th day of June, 1933, there was duly filed in said Court, Exceptions of Defendant, Food Machinery Corporation to Master's Report, in words and figures as follows, to wit: [103]

[Title of Court and Cause.]

EXCEPTIONS OF FOOD MACHINERY CORPORATION TO MASTER'S REPORT.

Comes now defendant Food Machinery Corporation, and excepts to the report of Robert F. Maguire, Esq., the Standing Master, filed in this cause on the 31st day of March, 1933, and for cause of exceptions show:

I.

The Master failed to find that Food Machinery Corporation recover its costs from plaintiff.

WILSON & REILLY,
Solicitors for Defendant,
Food Machinery Corporation.

[Endorsed]: Filed June 15, 1933. [104]

AND AFTERWARDS, to wit, on the 4th day of December, 1933, there was duly filed in said Court, an Opinion, in words and figures as follows, to wit: [105]

[Title of Court and Cause.]

MEMORANDUM

McNARY, District Judge:

It clearly appears from paragraph seven of the contract that the parties contemplated that the royalties accruing thereunder should at least equal the sum of $15,000 to October 1, 1931, provided the first party did not exercise its option and cancel the contract by giving notice as therein provided.

No notice of cancellation of the contract was given, and the plaintiff is entitled to a judgment in the sum of $15,000, less the payments of royalties made prior to October 1, 1931.

The damages caused by the destruction of the market for Cook graders and the estimated royalties on additional machines which would have been sold after October 1, 1933, until the expiration of the contract had defendants performed their obligation, will be treated as general damages.

The finding of the Master that the general damages should be assessed at $5,000 is supported by material and adequate evidence.

A decree will be entered according to this memorandum, and costs and disbursements will be awarded the plaintiff. The defendants' exceptions to the report of the Master will be overruled. Plaintiff's exception one to the Master's report will be

sustained insofar as consistent with this memorandum, and otherwise overruled.

[Endorsed]: Filed December 4, 1933. [106]

AND AFTERWARDS, to wit, on the 20th day of December, 1933, there was duly filed in said Court, Objections by Defendants Asa B. Cutler and F. W. Cutler to Proposed Findings, in words and figures as follows, to wit: [107]

[Title of Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Come now the defendants, Asa B. Cutler and F. W. Cutler, co-partners doing business under the name of Cutler Manufacturing Company, and Cutler Manufacturing Company, Inc., an Oregon corporation, and object to plaintiff's proposed Findings of Fact and Conclusions of Law served in response to the Court's memorandum of December 4, 1933, in the following particulars:

I.

These defendants hereby save and reserve all rights accruing under their exceptions heretofore urged to the Master's Findings and to the overruling of said exceptions by this Court.

II.

These defendants object to that part of proposed finding of fact X, beginning with the words "prior

to the institution of this suit" in line 25 to and including the words "contract of May 4, 1928, in Line 28 [108] of page 11 of said Findings, on the ground and for the reason that the the same is not supported by the evidence in that the undisputed evidence shows that at the time of the making of the contract the plaintiff insisted that by a mere incorporation of the partnership and transfer of the business of the co-partners Cutler to such corporation there would be no obligation on the part of the co-partners to further manufacture the Cook Grader, and that Paragraph XI was inserted to permit under such circumstances the plaintiff to retake and manufacture the Cook Grader.

III.

These defendants object to that part of the proposed Finding of Fact XIV finding that the oral contract referred to in said finding provided that the defendants Cutler would pay a 15% commission on all machinery and equipment sold by the partnership in the Medford district during the remainder of the year 1928 for the reason that the same constitutes a finding of liability on a contract not in issue in this case and the plaintiff is not entitled to recover in this case any sum over and above what the books of the defendants allow the plaintiff on items outside the written contract of May 4, 1928, and further that the oral contract herein referred to was one to pay plaintiff a commission only on those orders which he himself secured.

IV.

These defendants object to proposed Finding of Fact XV in that it does not follow the opinion of the Court on the exceptions to the Master's report and fails to allow these defendants credit for the sum of $1,536.57 paid to the plaintiff and particularly disallows $291.53 paid by the defendants to the plaintiff on account of the written contract of May 4, 1928. [109]

V.

These defendants object to proposed Finding XVI on the ground that the same does not follow the opinion of the Court on the exceptions to the Master's Report and fails to allow these defendants full credit for the sum of $1.536.57 paid the plaintiff and particularly disallows as payment on account of the written contract of May 4, 1928 the sum of $291.53.

VI.

These defendants object to proposed Finding XVII on the ground that it is contrary to the evidence and that written notice of the intention of these defendants not to proceed with the further manufacture of Cook Graders was given to plaintiff by plaintiff's Exhibits 11 and 12 and by the sworn answer of these defendants filed herein, all prior to October 1, 1931, and on the ground that the commencement of this suit was an election to treat the contract as breached and to collect full damages for the period plantiff claimed the absolute right to keep said contract in force, and on the

further ground that there was no obligation on the part of the defendants to pay the sum of $15,000.00 on October 1, 1931, and the said defendants had the right to fail to pay said sum and it created no obligation on the part of the defendants to pay to the plaintiff any sum other than royalties on machines actually sold.

VII.

These defendants object to proposed Finding XVIII and the whole thereof on the ground that it is not sustained by the evidence and is contrary to the evidence and on the further ground that written notice of the intention of these defendants not to proceed with the further manufacture of Cook Graders was given to plaintiff by Exhibits 11 and 12 and by the sworn answer of these defendants filed herein, all prior to October 1, 1931, and on the ground that the commencement of this suit was an election to treat the contract as breached and to [110] collect full damages for the period plaintiff claimed the absolute right to keep said contract in force, and on the further ground that there is no evidence in the record to sustain any finding of general damages in the sum of $5,000.00 or in any other sum.

VIII.

These defendants object to that part of proposed Finding XVIII beginning with the words "the facilities available" in Line 4 of page 16, to and including the words "machines heretofore sold" in Line 11 of page 16, on the ground and for the rea-

son that the same is not sustained by the evidence and is contrary to the evidence.

IX.

These defendants object to that part of proposed Finding XVIII beginning with the words "by reason of the defects" in Line 11 to and including the end of said proposed Finding XVIII, on the ground and for the reason that the same is not supported by any evidence in said cause and is contrary to said evidence.

CONCLUSIONS OF LAW.

These defendants object to proposed Conclusion of Law I and the whole thereof on the following grounds:

(a) That said Conclusion of Law is against the law and that under the evidence in this cause plaintiff is entitled to recover nothing from these defendants.

(b) That said Conclusion of Law does not comply with the decision of this Court on the exceptions to the Master's Report in that it fails to allow these defendants credit for the sum of $1,536.57 paid by these defendants to the plaintiff and particularly disallows an item of $291.53 paid by these defendants on the written contract of May 4, 1928.

(c) That there is no evidence supporting or tending to [111] support the allowance of the sum of $12,035.38 as damages or the allowance of any sum, and particularly no evidence warranting the allowance of $7,035.38 an alleged difference between

the sum of $15,000 and $7,964.62 found as payments made to the plaintiff on account of said written contract of May 4, 1928, and likewise there is no evidence supporting or warranting the allowance of $5,000.00 as general damages to said plaintiff:

II.

These defendants object to proposed Conclusion of Law II on the ground that the same is against the law.

That in connection with said cause and the decision thereof, these defendants request the Court to make the following Findings of Fact in lieu of the Findings of Fact proposed by plaintiff, which have previously been objected to herein by these defendants:

(a) That in the accounting between the plaintiff and the defendants the sum of $1,245.04 paid to plaintiff by the defendants Cutler was paid under an oral contract independent of the contract sued upon, which oral contract was that the said Cutlers would pay to the plaintiff 15% commission on all orders for machinery other than Cook Graders secured by the plaintiff in the Medford District during the year 1928.

(b) That during the period between May 4, 1928 and May 1, 1929 the Cutler partnership paid the plaintiff the sum of $6,751.76 of which $1,245.04 was paid on said oral contract, leaving a balance paid during said period on the contract sued on of $5,506.72.

(c) The total payments by the Cutler partnership and the Cutler corporation to plaintiff under the contract sued on were $8,256.15. [112]

(d) That the total amount of royalties and commissions due plaintiff under said written contract of May 4, 1928 was the sum of $7,089.43, and the Cutler partnership and the Cutler corporation overpaid the plaintiff $1,166.72.

(e) That prior to the filing of the complaint herein the Cutler partnership and the Cutler corporation notified plaintiff orally and in writing that they considered the contract of May 4, 1928 terminated and that they would not proceed further with the manufacture of Cook Graders, that by the sworn answers of the defendants F. W. Cutler, Asa B. Cutler and Cutler Manufacturing Company, Inc. filed on or about February 20, 1931 similar written notice was given to plaintiff; that prior to the 1st day of October, 1931 plaintiff had full knowledge that the Cutlers as individuals and the Cutler corporation looked on the contract as terminated and that they did not intend to and refused to perform it further in any respect then or at any time in the future.

CONCLUSIONS OF LAW

(a) That plaintiff is not entitled to recover anything from any of the defendants and that defendants F. W. Cutler and Asa B. Cutler are entitled to recover from plaintiff the sum of $1,166.72.

(b) That defendants are entitled to recover their costs and disbursements in this suit.

(c) That the Master's compensation of $..... for his services and $25.00 for his expenses shall be paid by plaintiff. [113]

OBJECTIONS TO PROPOSED DECREE

These defendants object to the rendering or entering of the decree herein proposed by plaintiff, on the following grounds:

(a) That under the pleadings and evidence plaintiff is entitled to no recovery against any of the defendants, but on the contrary the defendants F. W. Cutler and Asa B. Cutler and the Cutler Manufacturing Company, Inc. a corporation, are entitled to recover from plaintiff the sum of $1,166.72, and their costs and disbursements, and the remaining defendants are entitled to recover of and from plaintiff their costs and disbursements.

Respectfully submitted,

JOHN F. REILLY
JAMES G. WILSON
Solicitors for Defendants.

[Endorsed]: Filed December 20, 1933. [114]

AND AFTERWARDS, to wit, on Wednesday, the 20th day of December, 1933, the same being the 37th Judicial day of the Regular November Term of said Court; present the Honorable John H. McNary, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [115]

[Title of Court and Cause.]

ORDER OVERRULING OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above matter coming on for hearing on the objections of the defendants, F. W. Cutler, Asa B. Cutler and Cutler Manufacturing Company, Inc., a corporation, to the Findings of Fact, Conclusions of Law and Decree proposed by plaintiff, and on the Findings of Fact and Conclusions of Law proposed by said defendants,

IT IS NOW ORDERED that said objections and each and all thereof be and the same are hereby overruled and disallowed and said Findings of Fact and Conclusions of Law proposed by said defendants are and each of them is refused and exception is allowed to said defendants as to the ruling of the Court on each of said objections and each of said requests for Findings and Conclusions of Law.

Dated this 20th day of December, 1933.

JOHN H. McNARY,

Judge.

[Endorsed]: Filed December 20, 1933. [116]

AND AFTERWARDS, to wit, on the 20th day of December, 1933, there was duly filed in said Court, and entered of record therein, Findings of Fact and Conclusions of Law, in words and figures as follows, to wit: [117]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case, being at issue on the pleadings, was referred by the court to the Honorable Robert F. Maguire, the Standing Master in Chancery. The case was then tried before the said Master, who thereafter submitted to the court his Report. Within the time allowed by the rules and orders of the court all parties filed exceptions to said Report. Plaintiff filed three exceptions: defendants Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc., filed seven exceptions: and defendant Food Machinery Corporation filed one exception. The exceptions thus filed were heard by the court on oral argument and written briefs by all parties. The court after due consideration of said Report and the exceptions thereto, and having ruled and determined that all exceptions of defendants to said Report should be overruled and that plaintiff's Exception No. I should be allowed [118] in part, makes the following

FINDINGS OF FACT

I.

At the time of the commencement of this suit plaintiff was a resident and citizen of the State of

Oregon, and defendant Food Machinery Corporation was a corporation organized and existing under the laws of the State of Delaware, and was a citizen and resident of the State of Delaware. The matter in dispute between plaintiff and defendant Food Machinery Corporation exceeds the sum of $3,000, exclusive of interests and costs. A complete determination of the controversy between plaintiff and defendant Food Machinery Corporation can be had without the presence in this suit of any of the defendants other than defendant Food Machinery Corporation. Said controversy between plaintiff and defendant Food Machinery Corporation is separate and distinct from any controversy between plaintiff and any other defendant, and said controversy between plaintiff and defendant Food Machinery Corporation is wholly between citizens of different states, to-wit: between plaintiff, a citizen of Oregon, and defendant Food Machinery Corporation, a citizen of Delaware.

II.

Prior to the year 1927, plaintiff conceived and designed a device for grading fruit. The purpose of the device was to sort fruit according to sizes, in order to facilitate packing and marketing of fruit with uniform sizes in each container. During said period plaintiff developed the machine and sold several, particularly in the Medford district in Oregon, where [119] the machines were used primarily for the sorting of pears. When Cook entered the field there was practically no use of ma-

chines in sorting pears, and producers depended generally on hand sorting.

III.

On or about October 25, 1927, plaintiff was granted United States Letters Patent No. 1646951 on his device for grading fruit, designated as Cook Fruit Graders and Sorters; and thereafter on or about December 4, 1928, plaintiff obtained a reissue of said patent under No. 17149. After the date of said patent and during all times herein mentioned plaintiff was the sole owner of said patent and of the invention therein disclosed.

IV.

On May 4, 1928, and prior thereto, the Cook Grader, embodying the principles of said design, was being marketed by plaintiff in competition with other devices in the fruit industry, and plaintiff had an established business of marketing his graders.

V.

Prior to May 4, 1928, defendants Asa B. Cutler and F. W. Cutler were engaged in business in Portland, Oregon, as a partnership, doing business under the name Cutler Manufacturing Company (hereinafter sometimes referred to as the "Cutler partnership"). Said partnership was engaged in the business of manufacturing and distributing a wide variety of machinery for general use in the fruit growing and marketing industry throughout the world. The partnership had a vigorous and suc-

cessful business and, with its sales organization, was [120] in a position to obtain a wider and more profitable market for Cook Graders than plaintiff with his more limited means of financing and manufacturing, was able to accomplish.

VI.

On or about May 4, 1928, the Cutler partnership, as one party, and plaintiff as the second party, entered into a contract in terms as follows:

"THIS AGREEMENT made this 4th day of May, 1928, between Asa B. Cutler and F. W. Cutler, partners doing business as Cutler Manufacturing Co., of Portland, Oregon, hereinafter referred to as the company, and Floyd J. Cook of Medford, Oregon, hereinafter referred to as the second party, WITNESSETH:

"That in consideration of the agreements herein set forth, and of the execution of this agreement by the parties, the parties hereby agree:

"FIRST: Said second party hereby grants to the said company for the term beginning May 1, 1928, up to and including September 30, 1933, the exclusive right to manufacture and sell that certain fruit grading and sorting machine known as the 'Cook Grader,' and which is set forth and covered by patent number 1646951, dated October 25, 1927, granted by the government of the United States to said Floyd J. Cook, patentee, with all modifications, alterations, and improvements thereof, including attachments thereto or means

of delivery or receiving fruit sold in connection with the said Cook Grader. Said company during the said term will not manufacture any fruit grading machine of the same nature and for the same purpose as the said Cook Grader, except such grading machines as are now being manufactured by the said company.

"SECOND: The second party will at his own expense, diligently prosecute before the United States commissioner of patents, a reissue of the above named patent, and in the event of such reissue the said company is hereby granted the exclusive right to manufacture and sell machines under such reissued patent. If it shall become necessary or desirable to proceed against infringements against said patent or reissue thereof, or any modifications, alterations, or improvements thereof, suits shall be brought only by mutual consent of the parties hereto, and the cost and expense thereof shall be borne equally by the parties hereto. In the event suit is brought against the said company by third parties claiming that said Cook Grader infringes on patents held by said third party, the second party hereby agrees to defend said suits [121] at his own expense and to satisfy and pay any damages awarded against the said company in said suits, provided that the said second party shall have the right to require the final determination on appeal by a court of last resort, before he shall be required to pay or satisfy any such judgment.

"THIRD: The company agrees to manufacture said Cook Grader and to make such blue prints, patterns, jigs and designs as it shall deem necessary or convenient in connection with said manufacture, all of which blue prints, patterns, jigs, and designs shall be owned by the company; and the company shall manufacture such Cook Graders in such quantities and numbers and sizes as shall be reasonably necessary to supply the demand therefor, and the company further agrees that all such Cook Graders shall be manufactured from good materials and with good workmanship, in keeping with approved methods of mechanical practice and manufacture.

"FOURTH: Such Cook graders shall be placed on the market by the said company and its agents, and the company shall promote the sales of said Cook graders with the same diligence with which the company promotes the sale of any other machine or product manufactured by the said company, and shall advertise the same as 'Cook Fruit Grader' with the same diligence that the said company advertises any other product or machine manufactured by the said company, having in view the nature and extent of the markets for the respective machines.

"FIFTH: All orders for Cook graders in the hands of the second party at the date of this contract are hereby assigned to the said company, and the said company hereby agrees to assume all obligations of the second party on all said orders and to fill said orders promptly. It is understood

that all materials in the hands of the second party at the date of this contract, have been paid for by the second party, and that all labor employed for the manufacture of said machines by the second party, has been paid to and including April 28, 1928. All materials ordered by the said second party and not delivered at the date of this contract, are to be accepted and received by the company and paid for by the company. All payrolls accruing, beginning April 30, 1928, are to be assumed and paid by the company. The company hereby agrees to pay the second party for any and all material and parts for manufacture of said Cook grader and attachments, now in possession of the second party at Medford, Oregon, at cost to the said second party as shown by invoices or records in possession of second party, and in addition thereto all sums paid by the second party for labor in and about the manufacture of said Cook Fruit Grader and attachments, subsequent to January 1, 1928; and in addition thereto, the sum of $800.00 as salary of the second party from January 1, 1928 to April 30, 1928; and in addition thereto all sums expended by the second party subsequent to January 1, 1928, as traveling and sales expenses in furthering the sales of said Cook grader and attachments, and in addition thereto [122] such additional sums shown by the records of second party as having been expended by the second party in the manufacture and/or sale of said Cook grader and attachments subsequent to January 1, 1928. All the said sums to be paid by the company to the second party

hereunder, shall be paid in cash and shall not exceed in the aggregate more than $5,000.00. It is understood that since January 1, 1928, the said second party has been conducting his business under the name and style of Cook Manufacturing Company. The said second party shall, within ten days from the date of this contract, deliver to the company an inventory of material and parts for which payments are to be made to the second party, and a statement of all other amounts to be paid to the second party by the company hereunder, and the company shall have the right to inspect all records relating thereto, and the company agrees promptly to check said inventory and records and to pay the sums herein provided for, within five days after the delivery to the company by the second party, of said inventory and statement. In the event the parties hereto disagree relative to any item of material, labor, and expense, above set forth, the amount not in dispute shall be forthwith paid by the company to the second party, and the disputed items shall be referred to arbitration, each party to select an arbiter within five days from the delivery of said inventory and statement, and the two arbiters so selected shall select a third; and the company shall pay the amount of such disputed items to the second party immediately upon the making of the award by said arbiters.

"SIXTH: The company will pay to the second party in cash, as hereinafter specified, a royalty

of ten per cent of the amount of the sale price of all equipment sold by the company, it being understood that under no circumstances shall the royalty payable to the second party hereunder, be less than $50.00 for each fruit grader with a sizing portion of thirty feet or longer, with a minimum royalty for smaller machines in the ratio of the sales price of such smaller machine to the sales price of such machines with a sizing portion of thirty feet or longer. All royalties accruing hereunder to May 1, 1929, shall be due and payable to second party on May 1, 1929, provided the company shall pay to the second party the sum of $300.00 on the last day of each calendar month for a period of twelve months, beginning May 31, 1928. On May 1, 1929, if the royalties and commissions accruing hereunder shall exceed $3,600.00, the company shall pay to the second party the difference. If, on May 1, 1929, the royalties and commissions accruing hereunder shall be less than $3,600.00, the said sum of $3,600.00 shall be treated as guaranteed royalty and commissions by the company, to be retained by the second party, and the deficit between the amount of said royalty and commissions and $3,600.00 shall not be thereafter charged by the company against subsequently accruing royalties. All royalties accruing hereunder, beginning May 1, 1929, shall be paid by the company to the second party at the end of each calendar month, for all shipments and/or deliveries made by the com-

pany during [123] said month, within fifteen days from the end of each calendar month. Beginning June 1, 1928, and continuing during the term of this agreement, the company will deliver to the second party by the 15th day of each month, a written statement showing the amounts of sales, if any, during the preceding calendar month, names and addresses of purchasers, and the equipment shipped and/or delivered during such calendar month.

"In addition to the sums hereinbefore required to be paid by the company to the second party, the company will pay to the second party a commission of fifteen per cent of the amount of all sales of Cook graders and attachments thereto, in the Medford, Oregon district during the year 1928; the said commission to be paid on all orders accepted by the company, payment to be made on or before the first day of May, 1929, as hereinbefore provided; and the company will pay to the second party the further sum of fifteen per cent commission on all sales of equipment to Henry E. Kleinsorge of Sacramento, California, and the Earl Fruit Company of California, during the year 1928, provided that such commission shall not be paid on more than four Cook graders sold to the said two named parties; said payments to be made on May 1, 1929, as above provided.

"SEVENTH: In the event that the commissions for the year 1928 and royalties accruing hereunder to October 1, 1931, do not equal or exceed the sum of $15,000.00, then the company on

October 1, 1931, shall pay to the second party such sum as shall be necessary to bring the said total up to $15,000.00, provided that the company shall have the option to withhold payment of such deficit and cancel this contract by giving the second party notice in writing to that effect; and provided further that if the company shall not pay such deficit on or before October 1, 1931, then the second party shall have the right at his option to cancel this contract by giving 10 days notice in writing to the company to that effect; and in the event this contract is so cancelled by either party as herein provided, then said second party shall have the right to manufacture and sell machines, equipment, devices, and attachments, described in said patent or reissue thereof, and all modifications, alterations and improvements thereof without any claims in favor of the company therein or thereto, as fully as if this agreement had not been made.

"EIGHTH: If either of the parties shall fail to keep and perform diligently and punctually, any of the terms and conditions hereof, the other party shall have the right to cancel and terminate this agreement for such breach, provided that before such right of cancellation shall be exercised, the party asserting such breach and claiming such right of cancellation, shall give the other notice in writing specifying such breach with reasonable certainty, and the other party may within thirty days after receiving such notice, make good such breach. If the party receiving

such notice shall fail within such [124] period of thirty days to make good such breach, then the other party shall have the right to cancel and terminate this contract, but such cancellation shall not release the other party from any liabilities then existing hereunder.

"NINTH: This agreement does not require the said second party to render any service to the company except as herein particularly specified, and should the company require the services of the second party otherwise than as herein specified, then and in that case the second party shall be paid by the company for said services in addition to the other sums herein provided for, the sum of $350.00 per month.

"TENTH: At the expiration of this agreement or earlier determination, the second party shall have the exclusive right and ownership in all improvements, attachments, and designs relating to said Cook grader and attachment, developed hereafter, whether the same shall have been made by the company or the second party. In the event during the term of this agreement such improvements shall be made as shall be patentable or make an application for patent desirable, the expense of such application for patent shall be paid by second party and such application shall be made in the name of second party; and at the expiration or earlier determination of this agreement, the second party shall have the option for the term of thirty days thereafter to take from the company all patterns, blue prints, jigs, and de-

signs relating to the manufacture of said devices, and any modifications, alterations, or improvements thereof, at the cost to the company of such patterns, blue prints, jigs, and designs. At the expiration of this agreement or its earlier determination, the second party shall have the option for the term of 30 days thereafter to take from the company all machines then on hand and materials then on hand for the manufacture of such machines, at their cost to the company, and in such case the second party shall have the right to inspect all records of the company relating to the cost of such machines and material. If the second party does not exercise said option, then the company may complete machines then in process of manufacture and sell such machines and any other machines then on hand, provided that the total number of machines so to be sold by the company hereunder after termination of this contract, shall not exceed ten, and provided further that the company shall pay to the second party royalty on all such machines so sold as if this contract had not been terminated.

"ELEVENTH: If during the term of this contract the company shall sell its business, the second party shall have the option either to require that the purchaser from the company shall assume and discharge all the company's obligations hereunder, or to cancel and terminate this agreement and put an end to all the company's rights [125] hereunder and prevent any rights hereun-

der from passing to such purchaser from the company.

"IN WITNESS WHEREOF, the parties hereto have set their hands on the day and year first above written.

(Sgd) CUTLER MANUFACTURING CO.
F. S. Cutler
Asa B. Cutler
Floyd J. Cook"

VII.

The allegations in plaintiff's complaint, in substance, that defendants Asa B. Cutler and F. W. Cutler solicited the license to manufacture graders under the said Cook patent, by representing to plaintiff that they, the said defendants, controlled the manufacture and production of fruit grading machinery and could and would procure large scale production and sales of plaintiff's grader, are not true. The allegations in plaintiff's complaint, in substance, that said defendants solicited the license to manufacture graders under the said Cook patent by representing to plaintiff that if said license were not granted, they, the said defendants, would place on the market a similar machine which would interfere with plaintiff's trade and nullify his patent rights, are not true. The allegations in plaintiff's complaint, in substance, that from the beginning of negotiations for said license said defendants intended to undermine and destroy plaintiff's machine and business and suppress his products, in order that they, the said defendants, might market a

competing machine, are not true. The making of the said written contract of May 4, 1928, was not induced by fraud, misrepresentation, undue influence or other improper means on the part of the Cutler partnership. Until [126] early in the year 1930 the defendants did not breach the contract. The failure by the Cutler partnership to render the monthly statements called for by said contract, during 1928 and 1929, was acquiesced in by plaintiff.

VIII.

After May 4, 1928, and throughout the remainder of the year 1928 the Cutler partnership, in performance of its obligations under said contract, produced and marketed a fruit grading machine in all respects similar to that which plaintiff had produced prior to May 4, 1928. The machine thus produced and distributed is referred to hereinafter as the "Original Cook Grader." During the fruit harvest season of 1928, the Cutler partnership discovered what they considered to be operating defects in the Original Cook Grader. To eliminate these defects and to adapt the machine to the grading of lemons, the Cutler partnership conducted experiments during the late months of 1928. As a result of such experiments the Cutler partnership altered the design of the Original Cook Grader, and in January, 1929, began to manufacture and distribute to the trade a machine of the changed design. The machine as thus altered was designated by the Cutler partnership as the "Improved Cook

Grader," and will be so referred to hereafter. The Cutler partnership and its successor, Cutler Manufacturing Company, Inc., manufactured and distributed the Improved Cook Grader during the remainder of the year 1929 and thereafter until the time in 1930 when the partnership and its successor ceased all efforts to manufacture and sell Cook Graders, as will be hereinafter stated.

IX.

The changes of the design of the Original Cook Grader, embodied in the Improved Cook Grader, were made by the Cutler [127] partnership in good faith to overcome certain defects and difficulties encountered in the operation of the Original Cook Grader. The Improved Cook Grader was not inferior to the Original Cook Grader, but rendered results equally as good as those of the Original Cook Grader and avoided certain operating defects present in the Original Cook Grader. The acquisition by said defendants of rights under a so-called Palmer patent was done in good faith and for the purpose of avoiding possible suits for infringement thereof in the manufacture of Cook Graders. The Improved Cook Grader was not less efficient than the Original Cook Grader.

X.

In November, 1929, the defendants Asa B. Cutler and F. W. Cutler caused the organization of a corporation under the name Cutler Manufacturing Company, Inc. (hereinafter referred to as the

"Cutler Corporation"). On or about February 14, 1930, the Cutler partnership transferred to the Cutler Corporation all of the partnership assets, including the rights of the partnership under the contract of May 4, 1928, with plaintiff. On April 5, 1930, the Cutler Corporation gave plaintiff written notice that it had taken over the business and assets of the Cutler partnership. There is no evidence that plaintiff assented to this assignment or consented to the substitution of the Cutler Corporation for the individual liability of the Cutlers as partners. Prior to the institution of this suit, and in his complaint, plaintiff has at all times insisted that the Cutler Corporation as well as the Cutler partnership was bound to perform said contract of May 4, 1928. By said transfer and assignment the Cutler Corporation assumed the burdens as well as the benefits [128] of said contract of May 4, 1928. Plaintiff never agreed to release Asa B. Cutler and F. W. Cutler, or either of them, from their obligations under said contract, and did not agree or promise to look thereafter solely to the Cutler Corporation for performance of the obligations under said contract undertaken by the Cutler partnership, and did not consent to the substitution of the corporation for the individual liability of the partners.

XI.

On or about March 29, 1930, as a result of negotiations which had been pending since as early as September, 1929, a contract was entered into between the Cutler Corporation and defendant Food

Machinery Corporation for the sale and transfer of the business theretofore conducted in Portland, Oregon, by the Cutler partnership and the Cutler Corporation to said Food Machinery Corporation. In said transfer said Food Machinery Corporation refused to accept an assignment of the contract of May 4, 1928, with plaintiff, because it was then manufacturing and selling a competing machine, known as the "Clear Machine," and did not desire to be bound by the provisions of the contract of May 4, 1928, requiring exclusive production and sale of the Cook Grader. Plaintiff declined to consent to any transfer or assignment of said contract to Food Machinery Corporation unless that corporation should be willing to accept the contract in toto, including the provisions relating to exclusive sales of Cook Graders, and although Food Machinery Corporation was willing to accept the contract if the exclusive provisions thereof were eliminated with the understanding that the Cutler Manufacturing division would handle only Cook Graders, said Food Machinery [129] Corporation was unwilling to be bound by said exclusive provisions. On June 25, 1930, a bill of sale of the assets of the Cutler Corporation was given to Food Machinery Corporation, and said bill of sale expressly excluded the contract of May 4, 1928, with plaintiff. After June 25, 1930, the business theretofore conducted in Portland by the Cutler partnership and the Cutler Corporation was carried on under the name "Cutler Manufacturing Company—Division Food Machinery Corporation."

XII.

After February 14, 1930, the Cutler partnership and the Cutler Corporation ceased entirely to manufacture and distribute any Cook Graders, and made no pretense of performing their obligations to plaintiff under the contract of May 4, 1928, except to assemble parts then on hand and to sell the machines from parts so assembled, under Paragraph Tenth of the contract.

XIII.

During the year 1929, while Improved Cook Graders were in use by fruit producers, operating difficulties developed due to the slope of the sides of troughs through which the fruit moved in the sorting process. On that account some fruit jammed in the machines and was damaged. The Cutler Corporation, without cost to the users, replaced the troughs with troughs of lesser slope. The completion of said changes occurred at or near the time of cessation of production of Cook Graders, as hereinbefore stated, in the spring of 1930.

XIV.

On May 4, 1928, or within a short time thereafter, the Cutler partnership and plaintiff entered into an oral contract whereby the partnership agreed to pay to plaintiff a commission [130] of fifteen per cent of the sale price of all machinery and equipment produced by the partnership, other than Cook Graders, sold by the partnership in the Medford district in Oregon during the remainder of the year 1928. Said contract will be referred to as the

"oral contract" to distinguish it from the written contract of May 4, 1928.

XV.

Between the date of the written contract and May 1, 1929, the Cutler partnership paid plaintiff the sum of $6,751.76, of which $5,215.19 was properly applicable to royalties due under the written contract, as shown in the following table:

Total payments to plaintiff (Deft. Ex. 3)		$6,751.76
Deduct:		
(1) Commissions admitted by defendants to have been earned under oral contract (Deft. Ex. 3),	$1,245.04	
(2) Additional commissions earned under oral contract (as determined by Master),	291.53	
Total deductions		1,536.57
Net payments applicable on royalties under written contract of May 4, 1928,		$5,215.19

XVI.

During the period from May 1, 1929, to the cessation of production, the Cutler partnership and/or the Cutler Corporation paid to plaintiff to apply on royalties due under the written contract of May 4, 1928, the sum of $2,749.43. The total payments, then, by the Cutler partnership and the Cutler

Corporation to plaintiff to apply on royalties due under the [131] written contract were:

Payments prior to May 1, 1929,	$5,215.19
Payments after May 1, 1929,	2,749.43
	$7,964.62

XVII.

Neither the Cutler partnership nor the Cutler Corporation gave to plaintiff notice of cancellation of the written contract, as required by Paragraph Seventh thereof, the giving of which was the condition upon which said defendants were to be relieved of the obligation to pay the difference between $15,000 and royalties actually paid prior to October 1, 1931. In 1930 Cook had actual knowledge that the Cutlers as individuals and the Cutler Corporation had disaffirmed the contract, that they looked on it as terminated and that they did not intend to and refused to perform it further in any respect then or at any time in the future.

XVIII.

By the contract of May 4, 1928, it was contemplated that the Cutler partnership would produce and market Cook Graders at least until October 1, 1931, and, if the cancellation privilege reserved in Paragraph Seventh was not then exercised, until September 30, 1933. After January 1, 1929, the demand for Cook Graders decreased materially, due in part to saturation of the market in some districts and to the fact that business conditions in fruit dis-

tricts became such that prospective buyers were financially unable to purchase. By reason of the cessation by the Cutler partnership and the Cutler Corporation of production and sale of Cook Graders in the spring of 1930, the Cook Grader was taken from the market. Successful marketing of a device [132] requires continuous sales efforts to retain the good will of the product. Any suspension of sales requires the expenditure of efforts to reestablish the market greater than those necessary to maintain an established market. The facilities available to plaintiff individually to reestablish a market for his product were less adequate than the facilities of the Cutler Corporation and the Cutler partnership to maintain a market. The cessation of production in 1930 followed closely upon the discovery of operating defects in the Improved Cook Grader in 1929, and the changes made by the Cutler Corporation in the troughs of machines theretofore sold. By reason of the defaults of defendants the Cutler partnership and the Cutler Corporation, consisting of the cessation of the manufacture and sale of Cook Graders from and after the spring of 1930 (except the assembly and sale of parts then on hand), and the failure of said defendants to perform their obligations to manufacture and distribute Cook Graders for the full term specified in said contract, that is, until October 1, 1933, plaintiff has sustained general damages in the sum of $5,000.00.

XIX.

At the time of the purchase by Food Machinery Corporation of the business and assets of the Cutler Corporation, the said Food Machinery Corporation knew of the existence of the Cook contract of May 4, 1928, and knew that by said transfer the Cutler Corporation would be in a position so that it would be unable to perform its obligations to plaintiff under said contract, and knew that on account of the transfer of said assets the Cutler Corporation would be unable to perform said contract or pay plaintiff damages for default by it in performance [133] of said contract.

XX.

The Master was engaged for a period of fourteen days in taking the testimony in this case, two days in hearing argument of counsel, and ten days in the consideration of the testimony and briefs of counsel and in preparation of his report, a total of twenty-six days. He incurred $25.00 traveling expenses. Reasonable compensation to the Master is the sum of $1,250.00, for his services and $25.00 for his expenses.

And based upon the foregoing Findings of Fact the Court has arrived at the following

CONCLUSIONS OF LAW

I.

Plaintiff shall recover from defendants Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc., the sum of $12,035.38, computed as follows:

Difference between $15,000 and $7,964.62, royalties paid on account of said written contract of May 4, 1928,	$7,035.38
General damages,	5,000.00
Total,	$12,035.38

II.

Plaintiff shall recover his costs and disbursements herein from defendants Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc.

III.

Defendant Food Machinery Corporation shall not recover [134] its costs and disbursements.

IV.

In the event that defendants Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc., shall not pay and satisfy said judgment and decree in plaintiff's favor, as indicated by a return of execution unsatisfied, plaintiff may levy execution to satisfy said judgment on any property of Food Machinery Corporation within this district, the title to which was in any of defendants Asa B. Cutler, F. W. Cutler or Cutler Manufacturing Company, Inc., and which was transferred to defendant Food Machinery Corporation as an incident of the transfer by Cutler Manufacturing Company, Inc., of its assets to defendant Food Machinery Corporation under that certain contract dated March 29, 1930, between defendant Cutler Manufacturing Company, Inc., and defendant Food Machinery Corporation.

V.

Execution shall issue to satisfy the judgment in plaintiff's favor.

VI.

The Master's compensation of $1,250.00 for his services and $25.00 for his expenses shall be paid by defendants Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc., with the same rights to the Master to be satisfied out of the assets of Food Machinery Corporation as are set forth in Conclusion of Law No. IV.

Dated December 20, 1933.

[Endorsed]: Filed December 20, 1933.

JOHN H. McNARY,
United States District Judge [135]

AND AFTERWARDS, to wit, on Wednesday, the 20th day of December, 1933, the same being the 37th Judicial day of the Regular November Term of said Court; present the Honorable John H. McNary, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [136]

In the District Court of the United States for the District of Oregon

FLOYD J. COOK,

Plaintiff,

v.

ASA B. CUTLER and FRANK W. CUTLER, co-partners doing business under the name of CUTLER MANUFACTURING CO., CUTLER MANUFACTURING COMPANY, INC., an Oregon corporation, FOOD MACHINERY CORPORATION, a Delaware corporation, formerly known as the John Bean Manufacturing Co., F. W. CUTLER, Director, General Agent and Attorney in Fact within the State of Oregon for Food Machinery Corporation, and CUTLER MANUFACTURING COMPANY, a division of Food Machinery Corporation,

Defendants.

DECREE

This cause came on to be heard by the Court on exceptions of all parties to the Report of the Honorable Robert F. Maguire, Standing Master in

Chancery, on July 31, 1933, and was argued by counsel; and thereupon, upon consideration thereof, it is ORDERED, ADJUDGED and DECREED as follows, viz:

I.

Plaintiff shall recover from defendants Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc., the sum of $12,035.38, and his costs and disbursements taxed herein in the sum of $667.38.

II.

Defendant Food Machinery Corporation shall not recover its costs and disbursements. [137]

III.

In the event that defendants Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc., shall not pay and satisfy said judgment and decree in plaintiff's favor as indicated by a return of execution against said defendants unsatisfied, plaintiff may levy execution to satisfy said judgment on any property of Food Machinery Corporation within this district, the title to which was in defendants Asa B. Cutler, F. W. Cutler or Cutler Manufacturing Company, Inc., or any one of them, and which was transferred to defendant Food Machinery Corporation as an incident of the transfer by Cutler Manufacturing Company, Inc., of its assets to defendant Food Machinery Corporation under that certain contract dated March 29, 1930, between defendant Cutler Manufacturing Company, Inc., and defendant Food Machinery Corporation.

IV.

Execution shall issue to satisfy the foregoing judgment and decree in plaintiff's favor.

V.

The Master's compensation of $1,250.00 for his services and $25.00 for his expenses shall be paid by defendants Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc., with the same rights to the Master to be satisfied out of the assets of Food Machinery Corporation as are set forth in paragraph III of this decree.

Dated December 20, 1933.

(Signed) JOHN H. McNARY,
United States District Judge.

[Endorsed]: Filed December 20, 1933. [138]

AND AFTERWARDS, to wit, on the 21st day of March, 1934, there was duly filed in said Court, a Statement of the Evidence, in words and figures as follows, to wit: [156]

[Title of Court and Cause.]

STATEMENT OF THE EVIDENCE

The following is plaintiff-appellant's condensed statement in narrative form of the testimony introduced upon the trial made in pursuance of Equity Rule 75(b) and lodged in the clerk's office for examination of defendant as provided by said rule:

COOK-CUTLER CONTRACT OF MAY 4, 1928.

FLOYD J. COOK,

as a witness for plaintiff, testified:

I received a letter from Cutler Manufacturing Company to myself, dated April 4, 1928, copy of which is marked Plaintiff's Exhibit 26 herein. I made reply thereto by letter dated April 9, 1928, copy of which is marked Exhibit 27 herein, and received reply from Cutler Manufacturing Company to myself by letter dated April 11, 1928, copy of which is marked Plaintiff's Exhibit 28. [157] As a result of this exchange of letters I came to Portland and called upon Mr. F. W. Cutler at the Cutler plant, 404 Mill Street. Mr. Cutler asked me if I wanted to sell my patent and I said I didn't think I did. He stated that he wished to fill out his line and take on a grader in the nature of mine, that he had looked into my patent and found the claims were very limited. He said they could use the Palmer patent and make one similar to mine to compete with it, but that they would rather have mine inasmuch as it had been on the market and been advertised and had a reputation. Whereupon I said that I might consider a royalty contract and we discussed matters of that kind. That is as near as I can remember the substance of conversation after four years. My recollection is that Mr. A. B. Cutler, brother of F. W. Cutler, was present at the conversation. That was our first talk. We negotiated over a period of several days and finally arrived at a sort of contract, or what we thought we could

(Testimony of Floyd J. Cook.)

make into a contract. Mr. Reilly, Mr. Cutler's attorney, was busy and at the suggestion of Mr. Cutler and Mr. Reilly, they employed Mr. Lester Humphreys to draw the contract. Lester Humphreys has since died. Mr. Humphreys was paid by the Cutlers. The contract dated May 4, 1928, as executed, was thereupon identified by the witness and it was agreed that the copy thereof attached to the pleadings of defendant as an exhibit was identical with the contract so identified. A copy of this contract is set out in the record in Finding of Fact No. VI. After the execution of this contract the Cutlers took over the entire business, machinery and parts as I had been conducting it theretofore at Medford and the parts in course of construction for the season of 1928. [158]

Exhibit 36 is a letter from the Cutler Manufacturing Company to Floyd J. Cook, dated May 7, 1928, a statement of assets and expenses of the Cook Manufacturing Company, in which name Floyd J. Cook was doing business as of April 30, 1928, assumed by the Cutler Manufacturing Company, and the voucher of the Cutler Manufacturing Company in payment to Floyd J. Cook for said assets and expenses assumed.

Exhibit 41 is a trial balance as of April 30, 1928, of Cook Manufacturing Company.

After the execution of the contract of May 4, 1928, as near as I can figure about the middle of September, 1929, I heard that the Cutler Manufacturing Company had joined the Food Machinery Company, substantially a combination of Anderson-

(Testimony of Floyd J. Cook.)

Barngrover, Stebler-Parker, Sprague-Sells, John Bean Manufacturing Company, and others, I guess.

Plaintiff's Exhibit 17 shows the names of the companies, all of which I had heard of before, except the Florida Citrus Machine Company. I thereupon consulted my attorney who advised me to call upon Mr. Cutler and ask him if such were the case, which I did. As I recall it Mr. Cutler told me that they had not joined the merger but were contemplating doing so. Whereupon I told Mr. Cutler that if they disposed of their business to anyone, they would be required—the purchaser would be required to perform my contract as set forth in paragraph eleven of the contract. I did not in that conversation know or ascertain that they had acquired the Clear patent.

At the time the business was turned over I turned over all the original plans of the patent and everything that was connected with the making of the Cook Grader. [159]

In January, 1930 I called at the Cutler plant to see Mr. F. W. Cutler. I went into his office and I think the first thing he said to me was that they were unable to sell, or they were not going to make any more Cook graders. In other words, that they were all through with me. Whereupon I got up and walked out of the office. I cannot place the exact time in the month of January this took place, except I would say it was between the middle and the latter part of the month. The conversation was very brief because when Mr. Cutler told me that he was not going to make any more of my machines, or could not sell any more, I got up and went out quick. That

(Testimony of Floyd J. Cook.)

was all there was to that conversation as far as I recall.

Q. You made no inquiry from him in the first place that caused that statement to come from him?

A. I presume I must have opened the conversation regarding my statement of account, or their plans, or some such a matter which brought forth the statement that he made to me. I don't recall just what it was. I opened the conversation.

On Cross-examination

the witness testified:

After the signing of the contract with the Cutlers I turned over my whole business to Cutler Manufacturing Company, all materials and parts that I had made during the winter and spring of 1928; everything that I had pertaining to the business that they wanted they took; they took my place in the business, so far as I was concerned. I stepped out of it.

Prior to the receipt by me of the Cutler letter of April 4, 1928, plaintiff's Exhibit 26, I had had previous discussions with them and had called upon them without their solicitation. As I recall the first time I was in there was in 1925 when I first [160] got the theory of the machine I showed them some plans, rough sketches, and tried to interest them in the development of it, of which I knew nothing. I next called upon them along in 1926 after having built some machines and had had some successful experience I again hoped to interest them. I might have called twice in the summer of 1926 but I don't recall

(Testimony of Floyd J. Cook.)

anything after that until the letter of 1928. I might have called once or twice in 1927 but I don't believe the subject of grader was discussed or attempt made to again interest them in the manufacture of the grader. All of these trips which I have mentioned, that is the two or three, I called specifically with the idea of trying to interest them in the development of the grader and at my own instance. Around the 1st of May, 1928, after the negotiations with the Cutlers had proceeded for several days and the matter of drawing the contract came up I think F. W. Cutler told me to go to your (that is, J. F. Reilly's) office. Your partner, as my memory serves me, was in Chicago and you yourself could not attend to the job, and I think either you or Mr. Cutler asked who my attorney was and I said Mr. Lester Humphreys and you said, all right, get him to do it. I don't believe you were present at the conferences or saw the contract unless it was after it was drawn. At that time Mr. Humphreys was my attorney. The contract was drawn by him at the instance of Mr. Cutler and paid by him. Mr. Cutler told me he would employ Mr. Humphreys to draw the contract and would pay for drawing it. He had been my attorney in other matters prior to May 4, 1928, and before coming to your (Mr. Reilly's) office I think I had talked over with him the fact that I had received a letter from Mr. Cutler in a general way but don't think I had talked over the details with him. If Mr. Reilly had been able to draw the contract I presume I would [161] have submitted it to Mr. Humphreys for his inspection and advice; I sub-

(Testimony of Floyd J. Cook.)

mitted the matter to Mr. Humphreys but think Mr. Cutler, during the preparation of the contract, went to Mr. Humphreys' office at least once before the signing of the contract, the contract followed and was the result of several conferences covering I imagine a week.

By the end of the 1928 season the Medford field was pretty well supplied with Cook machines; there were, however, some sales to be made there; I presume there could have been six or eight or ten put out; I intended, however, to branch out and come to Portland and establish a plant of my own. I am not prepared to say what the condition at the end of the 1928 season was in other pear districts, except I made a trip to Wenatchee, Washington, in the early part of 1928. I found it was not customary to use graders for pears there; apparently during the 1928 and 1929 seasons the Cutlers pushed the sale of Cook graders with the same degree of diligence that they applied to selling their other equipment.

On Re-direct examination,

the witness testified: his knowledge of market for graders and sizers through the fruit raising districts of the United States limited to the years '30, '31, and '32 was confined to an estimate of the production of pears and other fruits that would be used on those graders, the possibilities of sales in those districts where they are raised best, on the sales made in the districts such as Medford, and the possible sales that might be made where this amount of fruit was being grown and shipped; personal knowledge

(Testimony of Floyd J. Cook.)

I have not. I looked up and generally acquired knowledge of the production and growth of the packing industry with respect to pears.

On Re-cross Examination,

the witness testified:

I have no knowledge of the pack of pears in 1928 as compared with 1929, or the pack of 1929 as compared with 1930 or [162] 1931; like all industries the fruit growers ability to pay for grading machines in 1930 and 1931 was curtailed, to what extent I do not know.

F. W. CUTLER,

as a witness for the defendants, testified:

The contract of May 4, 1928, as attached to plaintiff's complaint and as set out in Finding of Fact No. 6, was identified by the witness as the contract between myself and Asa B. Cutler on the one hand and the plaintiff on the other.

Negotiations leading up to the execution of this contract started about the middle of April, 1928, a few days subsequent to a letter written by Mr. Van Wyk to Mr. Cook at Medford. Mr. Cook visited at my office in Portland and my recollection is that after the first conference Mr. Cook returned to Medford and in a few days or about a week later he came back to Portland and called at my office. We met that evening in the office of the Republican

(Testimony of F. W. Cutler.)

State Committee in the Imperial Hotel, that was about a week prior to May 4th. There were conferences held at very frequent intervals thereafter and the last three or four days prior to May 4th they were daily and sometimes twice a day. The last matter discussed, as I recall, prior to the execution was on May 2nd. We had apparently threshed out the many ramifications of the contract and Mr. Cook left my office with notes to take back to his attorney for the drawing up of the contract. On the morning of the 3rd he came to my office, much to my surprise, and said that he had discussed the proposed agreement with his attorney and a point had been called to his attention that he wanted to take up with me before he went on with the contract. Mr. Cook said "There is no minimum provided, minimum royalty provided in the contract. You don't have to pay anything if you don't make sales, and there is nothing in the contract about your selling out to anybody. Where would I be if you [163] should sell out to somebody?" I cannot give you exactly word for word the conversation, but what I have said is the substance of was was said there. I recall distinctly Mr. Cook saying, "Well, the way the contract is agreed on now all you have to do is incorporate and you could get out of it and shelve me." I said, "Well, Mr. Cook, if you have—in the first place, I don't think we could ever get away with anything like that, because it would appear to me to be collusion just simply to

(Testimony of F. W. Cutler.)

avoid the contract; I don't think we could get away with it legally, but in the second place, if you have any such lack of confidence in us as to think that we would try to pull a think like that after making a deal with you, why, we better not deal at all." "Well, he said, "that is all right, but my attorney said we ought to have something in there about your selling out to somebody." I attempted to dissuade Mr. Cook from going further with the negotiations, because it had been drawn out so long as it was I was getting to—being busy—to an end of patience in the matter in a way. I didn't think it was necessary; I assured him that we had no intention of selling out, had no plans for such a thing, but he still persisted in some clause that would give him what he thought he should have. I said, "Well, now, it is all right with me, then, if you will have your attorney add a clause to the agreement we have now got that if you don't like any purchaser—anybody that we might sell our business to" —he brought that point up before, that he might not like the next fellow; he had confidence in us, but he might not like the purchaser—I said, "If you can't make a deal with the purchaser and don't like him, you can put a provision in the contract that you can take your rights back under the license, under your patent." [164]

Q. Let me ask in that discussion on that subject whether there was anything said on the subject of your right to sell unhampered by the contract, or was that any part of the conversation?

(Testimony of F. W. Cutler.)

Thereupon objection by counsel for plaintiff was made that the answer called for testimony that modified or changed the written agreement, and was sustained by the Master. Over the objection by plaintiff and the ruling of the Master the following proceedings were had, all subject to the objection:

Q. (By Mr. Reilly) Let me direct your attention particularly, Mr. Cutler, to the question of whether there was any discussion as to any effect that clause should have upon your right to sell unhampered by anything——

A. There was no such discussion indicating that we would have a bar upon our being able to sell out.

Q. Well, was there any discussion to the contrary then?

A. Nothing to the contrary.

The MASTER: Well, was the thing discussed at all either way?

A. The discussion, as I have already testified, was that we did not expect to sell out, but there was no discussion that there was a bar being planned for that contract.

The MASTER: Well, I know that, but was there any discussion to the effect that you should have the right to sell out if you desired?

A. I don't know as I get the import of your question.

The MASTER: Was there any discussion in which you claim it was agreed that you should have the right or retain the right to sell without reference to this contract?

(Testimony of F. W. Cutler.)

A. Our conversation was based upon the assumption that we might sell.

Mr. REILLY: That doesn't answer the question.

The MASTER: Let me put it this way: Have you already stated [165] your recollection of the entire conversation upon this particular subject?

A. I think so.

The MASTER: All right. I think that answers my question.

During the negotiations leading up to the signing of the contract of May 4, 1928 I think I saw Mr. Humphreys once at his office along towards the end of the negotiations. That contract was drawn up without any direct consultation between myself and Mr. Humphreys except through Mr. Cook as an intermediate. With reference to the payment of Mr. Humphreys as I recollect Mr. Cook came to us after the contract was closed and executed after May 4th on the ground that we had gone to you (Mr. Reilly) to have you draw it up in which event we would naturally have borne the expense, and in view of the fact that our attorney was out of town and another one had been substituted that we should pay it anyway; we said all right we would do it; Mr. Humphreys had never been our attorney; I had never seen him before or since. It was admitted in the record that Mr. Humphreys died on May 14, 1929.

F. W. Cutler testified:

The execution of the contract of July 23, 1929 (the earliest document executed relating to the sale of the Cutler business to the Food Machinery Cor-

(Testimony of F. W. Cutler.)

poration), made no change whatever in our efforts to sell the Cook Graders; we continued to sell them wherever sales were possible with every facility we had in our organization; we continued to do this throughout the year 1929, throughout January and February and portion of February at least in the sale of machines in Southern California; we made some sales of lemon machines as late as May 24, 1930, one pear machine in Hood River in August, and another in Hood River in September, 1930; those orders were solicited and obtained by the successors of the [166] partnership; they were manufactured under the arrangement made by F. W. Cutler and Asa B. Cutler with the succeeding companies whereby the remaining parts left on hand in the inventory of the Cutler Manufacturing Company, a partnership, sold to Food Machinery Corporation were used up and the succeeding companies were to make any profit they could out of the assembling of those parts into the Cook Grader and they were to pay to F. W. and A. B. Cutler the amount of the royalties which we were obligated to pay to Mr. Cook; these machines were limited to the number of ten to make up the parts left on hand by our contract with Mr. Cook.

On Cross-examination

F. W. Cutler, witness for defendants, testified:

I do not recall what the objectionable features were in Mr. Humphreys' preliminary draft of the contract. Cook came to my office and called my atten-

(Testimony of F. W. Cutler.)

tion to the omission of the matters contained in clause eleven; the language of that clause was framed by Mr. Cook's attorney. I don't recollect having anything to do with the drafting of it. I drew up some notes for the contract in the first place and as I recall when Mr. Cook was in Medford I sent him a letter with a synopsis or memorandum of the discussion that had taken place with him on his visit here. Defendant's Exhibit 61 consisting of three sheets was the letter and memorandum of the contract sent to Cook at Medford after his first discussion; the letter is dated April 24, 1928.

The Food Machinery Corporation by verbal agreement with A. B. Cutler and myself sold some Cook graders in 1930. They retained the proceeds of the sales except that it paid to us the amount of royalty that we were in turn obliged to pay Cook under our contract. The Food Machinery Corporation had already paid for the remaining parts on hand as a part of the transfer of the Cutler [167] business to that company, on the assumption and under the agreement that they would use them. A. B. Cutler and myself had no facilities for carrying out the assembling of those parts. The Food Machinery Corporation made the entire profit on the sale except so far as the royalty was paid to us for transmission to Cook and the cost of the parts. There was no memorandum of that agreement. That arrangement was made here in Portland. It was not necessary to take it up with San Jose.

With reference to service of notice on Cook of the termination of the agreement, there was a verbal

(Testimony of F. W. Cutler.)

notice between Cook and myself in January, 1930, as far as we personally were concerned, as testified by Cook yesterday, and Cutler advised Mr. Cook by letter on April 5th, 1930. The letter of April 5, 1930, plaintiff's Exhibit 12, is addressed to plaintiff, signed by "Cutler Manufacturing Co. Inc., by A. B. Cutler, President" and reads:

> "We desire to give you notice that the Cutler Manufacturing Company, Inc. has taken over the business and assets of the Cutler Manufacturing Company, co-partnership."

This letter was written simply to advise Cook of our plans and what we were doing. It was my idea that Cook would have the right to cancel his contract if we sold out. You will recall in my testimony this morning I said I discussed that matter with Cook as to our incorporating and he stated we merely incorporated to get out of the deal. We had incorporated in this case here but we didn't intend to get out of the deal. The purpose of the letter was to tell Cook he would have the right, if he wanted, to cancel the contract. It was up to him. If he didn't cancel it the Cutler Manufacturing Co., I believe, would have to carry it along. There was a doubt in our minds as to what would be the legal—we are not lawyers. I don't know the legality of the thing but I was simply trying to [168] give the procedure of what was going on. As late as April 5, 1930, we were in doubt as to whether there had been a termination of the contract between Cook and Cutler Manufactur-

(Testimony of F. W. Cutler.)

ing Co., a co-partnership, or not. We had not been advised by Cook that he would cancel if we incorporated ourselves but we had been advised by him very definitely he would not go on with the Food Machinery Corporation. That was brought up in the conversation in September, 1929, when Mr. Cook came to my office and not stated then that it was yet to be determined which machine—in the event we did finally sell to the Food Machinery Corporation it would be a matter between the choice of the Clear machine and the Cook machine as to which would be manufactured, and that although I was not the one to make the choice I rather thought it would be the Clear. And Cook said he would not permit the making of a Cook machine under our contract by this division if the Clear machine was going to be retained and built by the Food Machinery Corporation. In other words, as I understood him to say, he would insist upon the exclusive feature of his contract.

With reference to the conversation in January, 1930. I had been down in San Jose several times between the September conversation and the one in January. It had been definitely decided by the Food Machinery Corporation engineers and officials that they would not manufacture the Cook machine; didn't care to take on this contract that we had here and I advised Cook of that decision. The conversation was very short and he left shortly.

MASTER: That is what I still don't quite understand. If when you had that conversation in

(Testimony of F. W. Cutler.)

January, which so far as he was concerned and you were concerned seemed to put a termination to the arrangement, what was the necessity or purpose or object of [169] this letter of April 5, 1930?

A. Well, we had not been advised in writing: we didn't know whether Mr. Cook would go on with it—he was hostile at the time. We had the right to manufacture ten machines under the contract and continued to do so. The letter of April 5, 1930, was written by defendants' attorney.

On Cross-examination the witness

FLOYD J. COOK

in rebuttal, testified:

It is difficult to say how many times I saw Mr. Humphreys in the progress of negotiations for the May 4th contract from the time I received the first letter from the Cutlers. I presume that I had seen him every day that I was here in town; it would be natural that I would; I was interested and here for that purpose.

Q. And you would go and discuss things with the Cutlers, and then you would go back and discuss them with Mr. Humphreys?

A. On several occasions I believe I did that; yes, sir.

Q. And Mr. Humphreys would tell you what to stand out for and what to withhold on?

A. Yes, sir.

(Testimony of Floyd J. Cook.)

Q. And you stated that you demanded that paragraph 11 be put in?

A. Yes, sir. It is my recollection that the putting in of paragraph 11 was the last thing done before signing; there was a conversation in which I demanded that some such clause be put in the contract before paragraph 11 was actually drafted and I had some conversation with Mr. Cutler as to what he was willing to do in that respect before paragraph 11 was actually drafted; and then I went to Mr. Humphreys and told him of the agreement that Mr. Cutler and I had reached in that respect; and it was on information furnished by me to Mr. Humphreys that he drew this paragraph 11 and after the paragraph was thus included the contract was signed. [170]

AGENCY CONTRACT.

Cook, as a witness for plaintiff, testified: That after the contract of May 4, 1928 was signed I was appointed Cutlers' sales agent in the Medford territory for the season of 1928.

On Cross-examination, plaintiff testified:

Q. (By Mr. Reilly) Now during 1928, after this contract was put into effect, Cutler Manufacturing Company manufactured and sold the Original Cook; is that right?

A. Yes, sir.

Q. And you were their agent?

A. In the Medford territory.

F. W. CUTLER,

witness on behalf of defendants, testified: The arrangement made with Mr. Cook with reference to commission on equipment other than Cook graders was made shortly after May 4th; it was a verbal arrangement made by Mr. Cook and myself and Mr. Van Wyk, the sales manager; on the basis of it he was going to be in the Medford district selling Cook apparatus, Cook Graders and connecting links, and at the same time he had just as well represent us on the sale of other equipment other than Cook, and it was agreed that whatever orders he would get he would get 15% commission on them; it was limited to orders that he would take; we did not at any time agree to make him our exclusive agent in the Medford district for anything; at that time Mr. Cook, as I recall it, told us that he was not going to be there all summer.

On Cross-examination,

the witness testified: That Cook was to receive 15% commission on any equipment that we manufactured and sold other than the Cook equipment which was already provided for in the contract for which he obtained orders from customers. If we received orders that he had not obtained he was not to be allowed a commission. By the words exclusive agent I [171] meant that the arrangement with Cook would be contrasted with the arrangements which we have with permanent agents who are in the districts from year to year, and with whom we make what we call an exclusive agency arrangement, whereby they get a commission on all sales that are

(Testimony of F. W. Cutler.)

made of all equipment in their territory, whether the order comes from the customer direct to us or whether the agent goes out and gets the order and sends it to us; I don't believe that any such arrangement was made with Cook. The arrangement, as I recollect it, was that he should obtain commission only on orders he got from customers; I think it is very possible that during the course of the transactions in the Medford district we did allow Cook commissions in some instances for orders that he did not personally obtain; that would be likely under the policy that we usually follow in connection with agents; if we were convinced that an order which came direct to us was really attributable to efforts which had been made by Mr. Cook we certainly would give him the commission. I assume Mr. Cook sent us reports of sales made by him from time to time; I did not personally receive them; any orders that he obtained on our order form would be presumably in his handwriting, made out by himself, and there is a space provided in the upper right hand corner, I believe, for the salesmen to enter his name, and orders which he obtained should have his name on them; I have not gone over his orders in detail as to identify Mr. Cook's orders; we sometimes received orders by telephone and occasionally by telegraph; the salesmen would invariably, or most certainly should, write us in connection with any such order; if he didn't we wouldn't know where it came from and the chances are he wouldn't get credit.

(Testimony of F. W. Cutler.)

In the case of an order by telegraph or any other way than by a signed order with the salesman's initials on, unless we [172] knew from conversation with him in the past, or letters that had already come in, that he was working on that customer for that particular thing I don't believe he would be credited with the commission. I personally may have had conversations myself with Cook as to sales he made at Medford during the season for which he was employed but I do not recall them now. In swearing to the answer of the Food Machinery Corporation as to the amount earned by Cook outside of the machinery manufacturing contract I relied upon accountant we had, Mr. Van Wyk. He determined the amount due Cook. As to the details of commissions, we were very conscientious in going through our records to find each and every transaction we thought was attributable to Cook as far as commission is concerned, or which under the contract he was entitled to royalty on. We had no thought of trying to beat him out of anything. I do not recall myself any agent aside from Cook we had in the Medford district during the period Cook was to receive 15% under the verbal contract. I do not know of any letters written him defining any limit on his agency. If any such letters were written Mr. Van Wyk would know of them.

On what we allowed Cook our contract was our guide. The payments to Cook for commissions on equipment outside of the manufacturing contract were necessarily connected up with the payments

(Testimony of F. W. Cutler.)

that were due him under the contract by virtue of the contract that Mr. Van Wyk testified to yesterday. We made an advance payment in August, 1928, to Cook of $1000. not specifying particularly what it was about, although he did say it was for commissions. That was the discussion that preceded it but it went in as a charge on his account.

The allowance made Cook outside the manufacturing contract was based on whether Cook actually sent the order in or [173] whether we were convinced he was responsible for that sale. Where there was a doubt, where he didn't actually have his name on an order, verbal or written evidence that he was actually entitled to it, then we had to use our judgment.

If commission has been allowed to Cook on the report which was made by Mr. Van Wyk with respect to any certain sale of other than Cook equipment in Medford, I assume that there must be evidence in our files to indicate that the order was taken by Mr. Cook, or that he was responsible for its coming to us; and that any orders from Medford on which Cook was not allowed a commission it would necessarily follow there was no evidence of it having been obtained by Cook. My understanding of the arrangement with Cook was that he was not to have any commission on anything unless he obtained the order himself.

PAUL VAN WYK,

witness for defendant, testified that Floyd J. Cook was to be the agent of the Cutlers in the Medford district or at Medford for the year 1928 which would mean that he would sell any Cutler equipment and receive a commission on it in that district regardless of whether it was Cook graders or not. The witness testified that in his position as sales manager for defendants, he made his estimates for future business on various bases, adding, "As I said before, we rely principally upon our agents' estimates." He stated further that Floyd J. Cook was the agent in Medford upon whom he relied for estimates on fruit grading machinery.

I was present and took part in the arrangement which was made with Mr. Cook for acting as an agent of the Cutlers at Medford from May, 1928, to May, 1929. That arrangement occurred shortly after the signing of the contract of May 4th. The entire arrangement was a verbal one, Mr. Cook, Mr. F. W. Cutler and [174] myself, between the three of us, and Mr. Cook, at that time was granted the privilege of selling other equipment than covered by the contract and it was agreed that he would receive a commission on all sales made by him in the Medford district during that period.

Q. Was there any agreement to pay him commission on all sales made in the district, whether made by him or not?

A. No, there was not, for this reason: that Mr. Cook mentioned at the time that he was busy with other matters, I believe it was politics, particularly,

(Testimony of Paul Van Wyk.)

and that he would not be able to service machines, or anything of that character; but this matter being only for one year, that all he would be able to handle is the sales which would be made in conjunction with the sale of Cook Graders. The fact of the matter is along those lines that Mr. Cook wanted to be sure that he would not be called to give service, and that if he should,—he anticipated that in advance of the contract,—that he would be paid, as I remember it was stipulated, $325.00 or $350.00 a month, should he be called upon to do any work for us in the Medford district.

On Cross-examination,

the witness testified:

We never paid him $350.00, we did not call on him for any work other than sales; I personally do not know whether Cook saw every single man in the Medford district to whom any sales of any kind could be made; we have to leave those things to our agents. We assume they cover the trade thoroughly. I have no reason to believe that Mr. Cook did not. We have no knowledge of what Mr. Cook did with reference to soliciting the trade; that is something Mr. Cook did but I would not have any knowledge of it. I can recall only one instance where we were told by the [175] customer that Mr. Cook had seen him before giving the orders, the customer wanted to be sure Mr. Cook got the commission on the order.

FLOYD J. COOK,

the plaintiff, called as a witness for plaintiff in rebuttal, testified with reference to the agency contract for the year 1928.

Q. (By Mr. Bristol) In order to obviate any more talk by Mr. Reilly, particularly, you just state what that arrangement was and what the Cutlers did about it and told you they would do?

Mr. REILLY: That is objected to insofar as it calls for him to state his conclusion as to what the arrangement was.

Mr. BRISTOL: That was the Master's own question.

Mr. REILLY: I can't help it whether it was the Master's own question or not. The only thing that would be admissible would be the conversation. It is for the Court to determine what the legal effect of those conversations was.

The MASTER: He may testify as to what was said and done between them, what was said and done between them with regard to this arrangement. I think if you let him tell that you will have the whole thing.

A. It was my arrangement, understanding and agreement of that appointment as agent——

Mr. REILLY: Just a moment. That is objected to, for it is the very vice that I am objecting to.

The MASTER: What did they say to you and what did you say to them about the commission agreement, in substance?

(Testimony of Floyd J. Cook.)

A. They appointed me their agent to act in the Medford District for the season and agreed to pay me a commission of fifteen per cent on all sales made in that district by the company. Now, in [176] explanation of that, if Mr. Reilly will permit me, I want to repeat two or three things. In the first place,——

Mr. REILLY: Are these conversations?

A. No.

Mr. REILLY: Then I object.

Q. (By Mr. Bristol) Well, are they things that you told Cutler?

A. And Cutler told me.

Mr. BRISTOL: Well, that is what he asked you, if they were conversations.

A. I wasn't going to repeat the conversations. They were the result of conversations.

Mr. REILLY: We don't want the result of conversations. We want the conversations.

The MASTER: What was said and done, as near as you can recollect, about the royalty on the sales of the Cutler people in the Medford district for the year 1928?

A. I explained to Mr. Cutler that I was a delegate for the Republican National Convention; that I expected to be gone during the entire month or the best part of the month of June; that I probably would be engaged in conducting the presidential campaign in the fall and would not be in Medford much of the time; that I personally knew every packing house manager and owner in Medford; that

(Testimony of Floyd J. Cook.)

many of them were under obligations to me for favors at different times; that I would call upon them and state to them that I was the agent of the Cutler Manufacturing Company and that any business that they sent to the company, either through me or directly, would be credited to me on my commission account. I subsequently called on those dealers and told them that. [177]

I left Medford the early part of June and returned the latter part of June, 1928.

With reference to the payment of $1000.00 to me on August 31, 1928, I state that while I had been gone in the East, a number of orders totaling, as near as I can remember it, around forty-five hundred or five thousand dollars had been received by the company through the efforts that I have just outlined here, and that I asked for a statement of those accounts and a settlement. They told me that they hadn't had time to make up the account and didn't like to stop to do it in the middle of the busy season, and after considerable pressure I got the check of $1000. out of them on account of those sales. My talk was with F. W. Cutler and the check of August 31, 1928 was given me by direction of F. W. Cutler. I would not say that this payment was made with sole reference to sales commission of 15%. It was a payment on account of what they owed me at that time, of all items of every nature, whatever I had coming to me; that was a payment on account of whatever I might have had coming to me at that time. I did not have at that time any statement of my royalties accumulations earned up to August 31, 1928.

(Testimony of Floyd J. Cook.)

On Cross-examination

the witness testified:

I had been getting my $300.00 a month right straight along. I understood in August there had been made $4500 or $5000 in sales outside the contract of May 4, 1928; that would mean a commission of $750.00 if the sales outside the contract were $5000. I understood when I returned from the East in June that sales in the neighborhood of $5000 had been made. I ascertained this in a general way when I went to the Cutler Manufacturing plant on my way to Medford in the latter part of June. My solicitation of the packing trade before I left for the Republican Convention was that I called upon each and every one of them whom I knew per- [178] sonally and stated that I was agent for the Cutler Manufacturing Company, and that in my absence, or under any circumstances, that any orders they chose to give to the Cutlers would be credited to me. That is the way I solicited the business, on that basis. And I think it was understood by Mr. Cutler that by reason of my acquaintance and influence with those men that it might increase the chances of his getting a certain amount of business whether I was there or whether I was not, that my friendship and influence with them would cause them to buy washers and things of that sort.

(Testimony of F. W. Cutler.)

TRANSFER OF BUSINESS FROM CUTLER, COPARTNERSHIP, TO CUTLER, CORPORATION, AND TO FOOD MACHINERY CORPORATION.

F. W. CUTLER,

called as a witness for plaintiff, testified:

On May 4th, 1928, at the time of the Cook contract Cutler Manufacturing Co., composed of the partners, was in no way connected with the John Bean Manufacturing Co. and did not handle any of the John Bean products up here. The Cutler copartnership at said time was in no manner connected with the Anderson-Barngrover Mfg. Co. nor Sprague-Sells Corporation, nor with Bean-Stebler System. The first business connection, if by that term is meant negotiations between any of said persons and the Cutler copartnership, was in 1922, which consisted of interchange of correspondence which culminated in nothing. It related to the selling of the Cutler assets. It died a quick death and was not revived for a number of years. The next contact in that negotiation was in February, 1927, which was verbal. That likewise was dropped. I do not recall the time or manner of various contacts with representatives of the John Bean Manufacturing Co. There were various of them, mostly verbal, one by long distance telephone, during 1927 or 1928. Prior to [179] September 16th, 1929, an arrangement was had in writing for the selling of the assets of the Cutler Manufacturing Company, partnership, to the John Bean Manufacturing Company, which was

(Testimony of F. W. Cutler.)

dropped. This document was ordered produced by the Master. It is an agreement dated July 23, 1929, whereby Frank W. Cutler and Asa B. Cutler agree to transfer to John Bean Manufacturing Company "all right, title and interest in all assets standing on the books of Cutler Manufacturing Company as of December 31, 1928", subject to conditions therein stated relating to an audit to be made as of October 31, 1929.

On or about November 29th, 1929, a corporation, known as the Cutler Manufacturing Company, Inc., was incorporated, with Asa B. Cutler as president, Frank W. Cutler as vice president, Paul Van Wyk as secretary, and I. R. Acheson as treasurer, and the Cutler Manufacturing Company, copartnership, sold their assets to this corporation in exchange for capital stock thereof. This was not done on November 29th, 1929, but February 14th, 1930. The charter was applied for some months in advance of that but was not put into effect but the same corporation was used and assets of the copartnership transferred to it on February 14, 1930. I authorized James G. Wilson to write the letter to W. C. Bristol, dated June 30th, 1930, which was received in evidence as plaintiff's Exhibit 11 over the objection of defendant. This objection was on the ground that said letter related to an offer of compromise and was without prejudice. The letter referred to was written by James G. Wilson to W. C. Bristol, "Attorney for Floyd J. Cook," and reads as follows:

(Testimony of F. W. Cutler.)

"Referring to your letter of April 29th, and subsequent telephone conversation with you in regard to the offer made by you on behalf of Mr. Cook in connection with the contract between Mr. Cook and Mr. Asa B. Cutler and Mr. F. W. Cutler of May 4, 1928, as I advised you at the time the offer would not be acceptable but stated I would sub- [180] mit the same, I am now authorized to say that the Cutlers will not consider the offer you made. This of course is without prejudice to the rights of the Cutlers or the Cutler Manufacturing Co. Inc.

"I am further authorized to advise you that the Cutler Manufacturing Co. Inc., has transferred its business to the Food Machinery Corporation. Mr. Cook was notified of the transfer of the business from the Cutler Manufacturing Co., a co-partnership, to the Cutler Manufacturing Co., Inc., but to date has exercised no option accorded him under the contract.

"Mr. Asa B. Cutler and Mr. F. W. Cutler consider that they have no further interest in the contract except to finish up the material on hand as provided for in said contract, and they will send Mr. Cook a statement of royalties due him with check to cover within a few days.

"I am writing this as attorney for Mr. Asa B. Cutler and F. W. Cutler and the Cutler Manufacturing Co., Inc. I am sending a copy of this letter to Mr. Floyd J. Cook, Corbett Building, Portland, Ore."

(Testimony of F. W. Cutler.)

Thereupon letter of April 5th, 1930, from Cutler Manufacturing Co., Inc., by A. B. Cutler, to Floyd J. Cook, was marked for identification plaintiff's Exhibit 12. This exhibit was subsequently received in evidence.

I do not know whether this was the first notice in writing given the plaintiff of the transfer of the assets from the Cook partnership to the Cutler corporation.

The Cutler corporation was dissolved in April, 1931. At that time the Cutler Manufacturing Co. had previously sold its assets to the Food Machinery Corporation and had no plant. As I recall, the date of transfer to Food Machinery Corporation was on or about March 29th, 1930. The actual transfer was not made by the instrument of March, 1930, but was accomplished by another instrument later. The machines and plant and parts that were in manufacture, with certain exceptions, were transferred from the Cutler Manufacturing Co. Inc., to the Food Machinery Corporation, which, with the exceptions noted, transferred the former business [181] of F. W. Cutler and Asa B. Cutler, as partners, to the Food Machinery Corporation. There were some assets within the physical confines of the plant which were not the property of the Cutler Manufacturing Co. Inc. and therefore not included in the sale of the corporation to the Food Machinery Corporation. Thereupon there was offered and received in evidence contract of March 29th, 1930, and marked plaintiff's Exhibit 13. The contract, dated March

(Testimony of F. W. Cutler.)

29, 1930, is between Cutler Manufacturing Co. Inc., and Food Machinery Corporation. Thereby the Cutler Company, the first party, agreed to sell

> " * * * the business of said first party, including all its assets, equipment, machinery, patterns, patents, and applications for patents, pertaining to said business, as will be shown by an audit to be made * * * as of March 31st, 1930, to which audit reference is hereby made, and which audit is made a part of this agreement by reference, together with the good will of the business of said corporation, and the right of using the name of Cutler Manufacturing Co., and any other property belonging to said corporation, of whatsoever kind, character or description, wheresoever situated, not referred to in said audit. Said party of the second part hereby agreeing to assume all liabilities shown by said audit."

As consideration therefor Food Corporation therein agreed to issue certain shares of its common stock, subject to approval by California authorities of the issuance of the stock.

There was received in evidence copy of the bill of sale from Cutler Manufacturing Co., Inc., to Food Machinery Corporation marked plaintiff's Exhibit 14. The bill of sale executed by Cutler Manufacturing Co., Inc., dated June 25, 1930, recited that

> " * * * in compliance with the contract made and entered into on the 29th day of March, 1930,

(Testimony of F. W. Cutler.)

by and between the Cutler Manufacturing Co., Inc., an Oregon corporation, and Food Machinery Corporation, a Delaware corporation, the undersigned, Cutler Manufacturing Co., Inc., does hereby sell, assign, transfer and set over unto Food Machinery Corporation, the business of the Cutler Manufacturing Co., Inc., including all of its assets, equipment, machinery, patterns, patents and applications for patents, pertaining to said business, as shown by the audit made by Peat, Marwick, Mitchell & Co., accountants and auditors, as of March 31, 1930, * * * together with the good will of the business of said corporation, and the right of using the name of Cutler Manufacturing Co., and any other properties belonging to said corporation of whatsoever kind, character or description, and wheresoever situated, not referred to [182] in said audit, saving and excepting therefrom, however, and which is not hereby transferred, the interest of the Cutler Manufacturing Co., a co-partnership, and/or Cutler Manufacturing Co., Inc., a corporation, in and to that certain contract made and entered into the 4th day of May, 1928, by and between Asa B. Cutler and F. W. Cutler, partners doing business as Cutler Manufacturing Co., of Portland, Oregon, and Floyd J. Cook, of Medford, Oregon, with reference to the manufacture and sale of fruit grading and sorting machine known as the 'Cook Grader.' "

(Testimony of F. W. Cutler.)

I had nothing to do with the Food Machinery Corporation acquiring on February 27th, 1929, the right to manufacture the Clear fruit grader and do not know who did. I knew that the John Bean Manufacturing Co. were manufacturing and selling a machine in competition with the Cutler Manufacturing Co. partnership, which machine was called the Clear machine. I assumed, of course, they must have had an arrangement for that purpose. I do not know when the John Bean Manufacturing Co. acquired the right. I derived information for the answer which I verified on behalf of the Food Machinery Corporation from the office of the Food Machinery Corporation in San Jose. I have not the contract of February 27th in my possession but can secure the same. Thereupon a copy of the Clear contract of February 27th, 1929, was offered and received in evidence as plaintiff's Exhibit 15. The Clear contract of February 27, 1929, was between Charles J. Clear, first party, and John Bean Manufacturing Company, second party. Thereby first party granted second party an exclusive license to use patent No. 1427264 for a five year term to December 31, 1934, on a royalty basis, with minimum royalty of $1500 per year. Second party had the right to cancel on 90 days' notice at the end of any year of the original or extended term. Second party had the right to extend the license for the life of the patent. Second party agreed not to assign the license or grant a sub-license without the written consent of first party. [183]

(Testimony of F. W. Cutler.)

A. B. and F. W. Cutler personally ceased to manufacture the improved Cook grader on transfer of the assets of the partnership to the corporation but caused the parts remaining on hand to be manufactured for them subsequently to that date, first by the Cutler Manufacturing Co. Inc., and secondly, by the Food Machinery Corporation. I cannot say how many were so manufactured. Mr. Van Wyk can tell. On February 14th, 1930, the partnership ceased operation because it sold its plant and equipment with which to manufacture. Remaining on hand at that time were certain parts of Cook graders which the contract with Cook gave us the right to manufacture and clean up the stock to the extent of 10 machines after discontinuance of our contract with him. Based on that provision and that right we caused to have those extra parts manufactured for us and they were sold to clean out that stock. The Food Machinery Corporation sold them for us as our agent. The consideration paid by the Food Machinery Corporation to the Cutler Manufacturing Co., Inc., for the assets of that company purchased by the Food Machinery Corporation was stock of the Food Machinery Corporation issued to the Cutler Manufacturing Co. Inc., which was later distributed to the stockholders of the Cutler Manufacturing Co. Inc., on its dissolution.

On Cross-examination

the witness stated that there were 4 machines manufactured after the sale from the Cutler partnership

(Testimony of F. W. Cutler.)

to the Cutler Manufacturing Co. Inc., shipping dates of which were February 28th, May 24th, August 13th and September 10th, 1930.

With reference to notice of transfer from Cutler Manufacturing Co., partnership, to Cutler Manufacturing Co. Inc. Prior to April 5th, 1930, Mr. Cook came over to our office, 404 [184] East Mill, I think around September 1st, 1929, or thereabouts, a few weeks one way or the other, and stated that he had heard we were going to sell our business. I advised him that negotiations were pending at that time whereby the Cutler Manufacturing Co., partnership, might dispose of its assets. Mr. Cook wanted to know where he stood in the matter with reference to his contract with the partnership, and I advised him that the contemplated purchaser might or might not choose to go on with the—to manufacture Cook graders, providing Mr. Cook was agreeable to such a course. And I also recall advising him at that time that I had received the impression from the contemplated purchaser of our business that they probably would not choose to manufacture another divergent grader, such as his, because of the fact that they already had an arrangement with a competitor to manufacture a machine of that general type. Mr. Cook stated that he could require a purchaser to manufacture the Cook grader, and I advised him at that time that in the event we sold our business to a third party that we had the right under our contract to consider that the contract between Cook and ourselves was cancelled. Therefore, at that time it was

(Testimony of F. W. Cutler.)

clearly brought forth, directly to Mr. Cook, that we contemplated a sale of our business. Mr. Cook very emphatically stated that he would not acquiesce whatsoever to the transfer of the rights under his contract with us, with the partnership, to a third party if that party were to manufacture a competing grader.

With reference to notification of transfer of assets prior to plaintiff's Exhibit 12—April 5th, 1930. At the time of the conversation I speak of directly with Mr. Cook, while the transfer was not an accomplished fact at that time, the notification was of the fact that a transfer and sale of the assets [185] of the partnership to the Cutler Manufacturing Co. Inc. was clearly and specifically given to Mr. Bristol, attorney for Mr. Cook, during the course of several hours conversation with Mr. Bristol and myself in Mr. Bristol's office, Portland, on or about March 17th, as I recall it, or some time in March. In the course of that several hours conversation with Mr. Bristol it was repeatedly brought out that the Cutler Manufacturing Co., partnership, had sold its assets to the Cutler Manufacturing Co. Inc., not including its rights under the contract of May 4th, 1928.

Before the date of the March 29th, 1930, contract there was a discussion between ourselves and the representatives of the Food Machinery Corporation as to whether or not the Cutler Manufacturing Co. Inc., assets included the Cook contract. This was had with Mr. Paul Davies, vice president and treasurer of the Food Machinery Corporation, who was

(Testimony of F. W. Cutler.)

conducting negotiations on behalf of the Food Machinery Corporation. I specifically stated to Mr. Davies that the Cook contract made between Floyd Cook and F. W. and A. B. Cutler was not included in the assets of the Cutler Manufacturing Co. Inc., which I believed to be true. (The foregoing testimony with reference to conversation with Davies prior to the execution of the March 29th, 1930, contract was taken under the equity rule over the ruling of the Master and over the objection of attorney for plaintiff).

Prior to the consummation of the transaction, that is, the passing of the bill of sale, and after the contract of March 29th, 1930, Mr. Davies raised the point as to whether the assurance I had given him was sufficient to safeguard the Food Machinery Corporation with respect to passing of this contract and he desired to have specifically incorporated in the bill of sale an exception to that effect, which I saw no objection to, and it was incorporated. [186]

Following the notice given by me to Cook and his attorney of the transfer of the partnership to the Cutler Manufacturing Co. Inc., and up until July 26th, 1930, we received no notice from Mr. Cook of his election to exercise any option he had, or claimed to have, under the Cook contract with respect to requiring the purchaser to take over the obligations of the contract, or an option to cancel, or any other option.

(Testimony of F. W. Cutler.)

F. W. CUTLER,

on behalf of defendants, testified:

Prior to May 4, 1928, the Cutlers had no contractual relations with any of the defendants named or any of the corporations who have been named as having joined in some form or other the Food Machinery Corporation. We had some discussions with some of the executives of the John Bean Manufacturing Company or the John Bean Spray Pump Company looking forward to some merger or sale. We had been approached by them on the subject at various times. We had offered no encouragement to the executives of the Bean Spray Pump Company or the John Bean Manufacturing Company prior to May 4, 1928. There were no pending discussions with reference to sale or merger at the time of the May 4, 1928 contract. I had seen Mr. Crummey in 1929 at Salt Lake and each time where we were approached with the idea that we might join with them the decision had been emphatically negative. After the May 4th contract Mr. Crummey of the John Bean Manufacturing Company did at times approach me particularly sometimes by visit as he came through Portland, later in 1929 he called me by telephone. Prior to July 23, 1929, the date of the first contract, the John Bean Manufacturing Company made approaches. In May, 1929, as evidenced by Exhibit 2, approach was made and we declined to consider any combination or sale. Mr. Crummey called upon us in Portland on March 18, 1929. The discussion at that time was largely a pre- [187]

(Testimony of F. W. Cutler.)

sentation on the part of Mr. Crummey of the advantages that would accrue to us by selling our company to them, some deal of that kind. Our response to that was very much negative. There may have been contacts between that and the first day of May but I have no recollection of them. On May 28, 1929, either my brother or I received a longhand letter from Mr. Crummey addressed to "My Dear Mr. Cutler"; said letter is defendants' Exhibit 6. My reply to that letter was dated June 21, 1929, and is defendants' Exhibit 7. My letter of June 21st seemed to foreclose all possibility of a deal between Cutler Manufacturing Company and the John Bean Manufacturing Company. It was brought back to life again by Mr. Crummey's persistence. Mr. Crummey on July 15, 1929 wrote me a letter taking up the question again. He saw us in Portland after June 21st and on July 15th sent us an air-mail of that date suggesting their Chief Engineer, Mr. Thompson, was up in this country on a vacation, was going to be here the first of the following weeks, that he would like to have Mr. Thompson meet us and at the same time Mr. Crummey and Mr. Davies would be glad to come up and wanted us to take dinner with them here in Portland. On the week prior to July 15th Mr. Crummey came into our office in the afternoon and made an appointment to meet him again in the evening. My brother and I had dinner on the East side, we wanted to talk this matter over, Mr. Crummey went somewhere else and we agreed to meet him back there at the office at six thirty, at

(Testimony of F. W. Cutler.)

that time I became rather inclined to have some kind of a deal if the consideration was satisfactory, my brother A. B. was very much opposed to it.

In November, 1929 we got a charter for the corporation Cutler Manufacturing Company, Inc., and organized that corporation in the middle of February, 1930. The principal reason for the incorporation was in view of the fact that we had four partners [188] in our business; when we came into 1929 we had an agreement with Mr. Atcheson, whom we were just taking into our employment, and Mr. Van Wyk, who had been with us for a number of years, whereby we agreed that they should have five per cent of the net profits of each year's business not to be drawn down in cash but to be set up as capital in the capital accounts of the company at the end of each fiscal year; in November, 1929 it occurred to us we had a two-party partnership trust agreement when we now had four partners in the business; that complicated it a good deal and was the main consideration for incorporating at that time; I expected and anticipated a sale to the Food Machinery Corporation and was getting into hot water disagreement and it was quite doubtful in our minds whether we would go on with it or whether the other parties would want us to go on with it; we were getting at loggers heads. So we applied for a charter before we got too far. There was also a second possible angle in connection with the Federal Income tax matters; those reasons were sufficient to warrant incorporation; on February 14th we sub-

(Testimony of F. W. Cutler.)

scribed for the stock and organized the corporation and transferred the assets of the partnership to the corporation; the stock was distributed among the four partners in the ratio as agreed upon; on March 29, 1930, no corporate action had been taken authorizing the contract of that date nor was there any corporate action on the subject of any deal with the Food Machinery Corporation.

Corporate action of the Cutler Manufacturing Company was taken at its stockholders and directors meeting on June 25, 1930. The minutes of the directors meeting of that date were received in evidence as defendants' Exhibit 8. The stockholders meeting of Cutler Manufacturing Company, Inc., held the same date was received in evidence as defendants' Exhibit 9. [189]

A catalogue was issued under the name "Cutler Manufacturing Company, Division of Food Machinery Corporation" prior to the time that the sale had been agreed to and approved by Food Machinery Corporation, because we were so confident in September, 1929, that this arrangement was going to go through, that we made a public announcement of it.

Although Food Machinery Corporation did not take over the Cook patent, it advertised the Cook Grader, under its own name in 1930, under the arrangement for manufacture and sale of parts on hand, made with A. B. Cutler and myself.

(Testimony of Paul L. Davies.)

NEGOTIATIONS BETWEEN CUTLERS AND FOOD MACHINERY CORPORATION

PAUL L. DAVIES,

a witness for defendants, testified:

I reside at San Jose, California, am vice president and treasurer of the Food Machinery Corporation, and have been since October, 1928. At that time that corporation was known as the John Bean Manufacturing Company. It is the same company with change of name. I was a director of the old Bean Spray Pump Company which was the antecedent of the John Bean Manufacturing Company. The John Bean Manufacturing Company was organized in 1928 but I had been a director of the Bean Spray Pump Company for approximately three years prior to that time. I was familiar with negotiations which took place between the Food Machinery Corporation and Frank W. and Asa B. Cutler. I took active charge of those negotiations on behalf of the Food Machinery Corporation on July 22, 1929. There had been approaches on both sides prior to that time, mostly on the part of the John Bean Manufacturing Company to see if the Cutlers would be interested in selling out their business. The Cutlers up to that time had stated they would not be interested. I was there in Portland on July 22, [190] 1929. I came here for the purpose of negotiating a deal with the Cutlers. Plaintiff's Exhibit 23 was a memorandum of July 23, 1929 and attempt to work out the details of sale. It was the crux of the

(Testimony of Paul L. Davies.)

whole agreement. We were shown a balance sheet of the Cutlers of October 31, 1928. We had no other available. The Cutlers had certain ideas of what the profits were going to be for 1929 and the whole deal was left for final settlement until the audit which was called for in that contract which was to be as of the end of the fiscal year October 31, 1929. In the working out of the details there were lots of discussions back and forth as there always is in such details but it was all on a good friendly basis. When we drew the memorandum of July 23, 1929 we had about an hour to catch the train and we sat down and arrived at a general memorandum contract of what our ideas on the subject were. This contract was never carried out. Following the execution of this contract on our return to San Jose we learned of the contract between F. W. Cutler and Asa B. Cutler on the one hand and Floyd J. Cook on the other, relating to the exclusive license to the Cutlers to manufacture the Cook graders. I cannot fix the time of this information. Under the agreement of July 23rd things went along in statu quo. My best recollection is that we didn't go into any details about the closing of the deal until sometime in September when the close of the fiscal year was coming up when the Cutlers knew about how much business they were going to have for the year and we began discussing the closing of the deal. The first time we seriously considered the Cook-Cutler contract was in September. It might

(Testimony of Paul L. Davies.)

have been discussed once or twice prior to that time when Mr. Cutler came to San Jose and it might have come up in general discussion but I never began to give it any thought until that time. When it came [191] up for consideration first of all we had a contract with Charles J. Clear. That contract contained a minimum royalty clause. We had spent in the neighborhood of $15,000 in making that machine a commercial success. I asked our engineers to make a report on what they felt was the best machine as between the Clear and the Cook Grader. They reported they thought the Clear machine was a much better machine. When the Cook contract came to my attention there was a clause in the contract that if we had taken over the contract we couldn't handle any competing machine which would have meant we would have had to get rid of the Clear machine. I told Frank Cutler that it would be impossible for us to give up the Clear machine and take over the Cook contract. I also told him there was a possibility that if Mr. Cook was willing to waive the provision calling for the exclusive handling by the Food Machinery Corporation that the Cutler division could continue to handle the Cook and the Bean division could handle the Clear. Subsequent to that time Mr. Cutler told me that he had talked to Mr. Cook and Mr. Cook had definitely advised him that the provisions of the contract had to be enforced. Thereupon I told Mr. Cutler definitely that we would not take

(Testimony of Paul L. Davies.)

over the Cook contract. To my best recollection that was in the latter part of October, 1929 when he and Mr. Asa B. Cutler attended the Board meeting in San Jose. Frank Cutler was elected a director of the Food Machinery Corporation at that meeting in October, 1929. He did not own any stock in the corporation at that time. We got right down to business when we finally got the audit revealing the results of the operations and the balance sheet of the Cutler Manufacturing Company as of October 31, 1929. This was in the latter part of December, 1929, or the first of January, 1930. Neither the directors or stockholders of Food Machinery Corporation had up to that time taken any official action on the memorandum contract of July 23, [192] 1929 nor on any revised contract. On March 29, 1930, a second contract, Exhibit 13, was signed. This was signed by the Food Machinery Corporation in the early part of April, 1930, subject to the approval of the Board of Directors. This came before the Board at its meeting on April 28th at which I was present. The Board of Directors approved the contract. The question of the Cook grader came into discussion at the April meeting. In all of our discussions subsequent to Mr. Cutler's talking the matter over with Mr. Cook it had been definitely understood that Food Machinery Corporation would not take over the Cook contract. In the discussion before the Board of Directors it was pointed out that we would not assume the Cook contract, in

(Testimony of Paul L. Davies.)

other words, that was not an asset that would be taken over. This was at the meeting of April 28, 1930. I also told the Directors at that time that in the final bill of sale transferring the assets that that would be definitely excluded. This information was given to the Board prior to the approval of the contract dated March 29, 1930. I think the audit was available at the April 28th Board meeting but I am not sure. Following that meeting around the middle of June, I couldn't say exactly, we received the bill of sale. Plaintiff's Exhibit 14 is a copy of that bill of sale. The Commissioner of Corporations of the State of California gave his consent and permission to such sale and transfer. The stock was turned over to the Cutlers subsequent to May 15th. All papers, including the stock of the Food Machinery Corporation, was sent to James G. Wilson for delivery upon the transfer of the bill of sale and deeds to the property.

On Cross-Examination

the witness testified: I never had any transactions direct with Mr. Cook. All negotiations were carried on with Mr. Cook through Mr. Cutler and I have no in [193] formation as to the information given to Mr. Cook except through Mr. Cutler reporting details of the conversation to me. He reported this when he came down to the Board meeting in October, 1929. So far as I know all of the other assets of the Cutler Manufacturing Company aside from

(Testimony of Paul L. Davies.)

the Cook contract were taken over by the Food Machinery Corporation, including general good will, bills receivable, and everything of that kind, both physical and raw materials on hand and everything of that sort. We took over the assets of the business as called for in the contract as subsequently ratified.

On Re-direct Examination

the witness testified: We took everything as outlined in the bill of sale. We did not take over the Cook contract.

PAUL VAN WYK,

a witness for defendant, identified as a true account between the Cutler Manufacturing Company, copartnership, and Cutler Manufacturing Co. Inc., a corporation, with Floyd J. Cook Defendant's Exhibit 3, which was received in evidence and substituted for Exhibit 2 attached to the answer. A third check was made of all of the invoice copies in our files to make sure that every item pertaining to Cook Graders would be included in the statement. This check was made both by one of our clerks and myself on separate occasions and then the lists compared to make sure that they agreed. The information as to royalties was derived from the original invoices and the amounts due Mr. Cook as commissions in the same manner. It is our practice

(Testimony of Paul Van Wyk.)
when entering invoices in our sales journal to credit the commission at that time, at the time of the sale or at the time of the entry, to the agent's account. This was done in this case besides which we went through the invoice file to see that none were omitted. [194]

The statement of evidence set forth in the following pages numbered 193 to 226, inclusive, was prepared by attorneys for plaintiff. [195]

In the fruit industry the words "fruit sizer" and "fruit grader" are used generally as synonymous terms. The function of a fruit grading machine is to sort fruit according to sizes to facilitate the work of the packer in placing only fruit of the same size in the particular container. (Plaintiff's witness Reter; Defendant F. W. Cutler).

Prior to 1925 there was no general use of machines for sizing of pears. (Plaintiff's witness Reter). The pear, particularly of some varieties, is delicate and bruises easily, even when green. (Plaintiff Cook). Growers in the Medford district in Oregon were prejudiced against machines then available because their use bruised the fruit. (Cook). Prior to 1925 defendants F. W. Cutler and A. B. Cutler sold a so-called weight machine, used principally for apples. There was likewise a machine known as the "Ideal", and another firm marketed a divergent rope type sizing machine, but there was

no sizing machine used generally for pears in the Medford district (Reter; Plaintiff's witness Kyle; Plaintiff's witness Edmiston; Cook), and the machines which were available were not satisfactory for pears. (Reter; Kyle).

The Cook Grader, as originally conceived and constructed by plaintiff, is described in plaintiff's patent and was described by witness. It has two parallel horizontal slots or troughs. Between the two troughs is a canvas belt, and outside of each and parallel to the troughs are canvas belts. The function of each trough is the same and a description of one is sufficient. Attached to the two belts on each side of the trough are flexible canvas aprons which extend into the trough to the opening in the bottom. The troughs are open at the bottom, leaving a space through which the fruit drops in the sizing operation. One side [196] of the trough is fixed. The other side is movable and is divided into segments. Each segment may be moved, by screws, horizontally in a direction perpendicular to the axis of the trough. By means of the movable segments the width of the aperture at the bottom of the trough may be varied. Thus, the aperture near the feeding end of the machine may be adjusted at, say, two inches. The aperture opposite the next segment may be increased to 2 1/16 inches, and succeeding segments may be adjusted to increase the aperture progressively. Fruit to be graded is placed on the aprons in the trough at the feeding end. It is carried along the trough until it reaches a point where

the width of the aperture equals or exceeds the diameter of the fruit. At that point the fruit drops into a bin beneath. By that means, in the example given, the first bin will receive fruit of a diameter up to two inches; the next bin will receive fruit varying from 2 to 2-1/16 inches; the next from 2-1/16 to 2-1/8 inches, and so on. By that means the fruit is sorted by sizes and the packer working at a particular bin has available fruit practically uniform in size to wrap and place in the shipping container. (Reter; Plaintiff's witness J. Cook; Plaintiff Cook).

Plaintiff conducted his business at Medford, Oregon, under the name Cook Manufacturing Company, of which he was the sole owner. (Cook).

In 1925 plaintiff constructed and sold his first four machines; and these machines were sold and used in packing houses in Medford for handling pears. (Kyle; J. Cook; Edmiston; Cook). The 1925 machines contained some faults in construction details. The 1926 season was devoted to further experimentation and study, and not more than one machine was built. (J. Cook; [197] Cook). In the 1927 season plaintiff constructed and sold eleven machines. (J. Cook; Cook). In the spring of 1928, prior to the contract of May 4, 1928, hereinafter referred to, plaintiff ordered parts and prepared for construction of 25 machines. (J. Cook; Cook). Negotiations for sales of some of the 25 were in progress when plaintiff made his royalty contract of May 4, and turned his business over to defendants

F. W. Cutler and Asa B. Cutler. (Cook). Up to that time plaintiff's sales had been to packers in the Medford district, but plaintiff was then negotiating for sales, which were later made by defendants, to a California packer, and had inquiries about his machine from Colorado and Washington. (Cook).

Plaintiff's machine was adaptable for other fruits including apricots, peaches and cantaloupe (Cook), and one witness tells of its use for grading peaches, on which it was working "very satisfactorily." (Reter).

At the end of the 1928 season, after sales by defendants, the Medford market was fairly well supplied, but there was still a possibility of sales in that district, and plaintiff, but for his contract with defendants, had intended to "branch out, come to Portland" and establish his own plant. (Cook).

Plaintiff's banker, during the period prior to May 4, 1928, testified that he consulted with plaintiff constantly, that orders as received were discussed, that the witness was satisfied that the orders could be filled at a profit to plaintiff, and on the basis of his information he had extended credit to plaintiff. Based on his information he concluded that plaintiff was then "conducting a successful business." (Harder).

Plaintiff applied for a patent on his device which was granted on October 25, 1927, No. 1646951. (Cook). After plaintiff [198] and defendants, the Cutler partnership, made the contract of May 4, 1928, defendants suggested that the claims of the Cook

patent were too narrow and did not give adequate protection. At their suggestion plaintiff applied for a reissue of the patent, which was granted on December 4, 1928, under Reissue No. 17149. (F. W. Cutler).

One Davidson claimed to be the owner of a Palmer patent and claimed that the Cook Grader infringed his patent. On October 7, 1929, the Cutler partnership took an assignment from Davidson of the Palmer patent to protect the Cook patent. (F. W. Cutler; Defendant A. B. Cutler).

Plaintiff recounted a conversation with F. W. Cutler, during the negotiations leading up to the May 4, 1928, contract, as follows:

> "Mr. Cutler asked me if I wanted to sell my patent, and I said that I didn't think that I did. He stated to me, as near as I can recall it—Mr. F. W. Cutler, I believe—that he wished to fill out his line and take on a grader in the nature of mine, and that he had looked into my patent and found the claims were very limited. He stated that they could use the Palmer patent and make one similar to mine to compete with it, but that they would rather have mine inasmuch as it had been on the market and advertised and had a reputation. Whereupon I said that I might consider a royalty contract, and we started in to discussing matters of that kind."

There is evidence to the effect that the Cook design had certain desirable features, not present in

other types of graders. One type of machine is known as the divergent type. The fundamentals of that type include two horizontal ropes on which the fruit is carried. The ropes are placed so that they diverge slightly, being relatively close together at the end where the fruit is received and farther apart at the far end. [199] Consequently, there is a constantly increasing space between the ropes. As the fruit is carried along it drops between the ropes when it reaches a point where the space between the ropes exceeds the diameter of the fruit. (Reter; Edmiston; Cook).

Witness Reter compared the Cook machine with those of other types in the following language:

> "Now with the ordinary divergent type or other types of machines, or the weight machine, for that matter, that had existed up to that time, necessarily the bins that were arranged for those three preponderant sizes would be overflowing, while the other bins would not have anywhere near their capacity, and with the Cook machine, by carefully calipering your diameters you could so graduate that as to spread them more thoroughly and get more capacity out of the machine than any other machine that I have ever had any contact with, and that was caused by being able to adjust these individual slides to a very fine point."
>
> "Well, with the Cook machine you get an absolutely positive size to each bin, and with the distributor you don't get a positive size to

each bin—you are not apt to. You can if it is carefully worked; it may be that you will get it; but the possibilities are that you won't."

Another witness testified to similar effect. (J. Cook). And a further witness used this language:

"The advantage of the Cook machine over that (divergent rope type) is that you can see that a divergent rope got gradually wider at all times. These ropes started out narrow at the end where the fruit was taken on and got gradually wider. Now in the Cook machine you could regulate each bin you could drop for; that is, you could regulate each bin, whereas you could not in the rope grader." (Edmiston).

By adjustment of the Cook machine it could be made into a divergent type. (Reter).

Plaintiff compared the two types as follows:

"The Original Cook Grader with the sizing bars adjusted laterally under the apron permitted [200] of a definite size in each bin, if so required. Any diverging principle does not permit of an immediate change in size from one bin to another. You cannot spring a piece of metal or wood sufficiently quick enough to immediately get your size from one bin to the other. That was the basis and the principle on which I received my patent. I could accomplish the same result as on the Clear machine (hereinafter referred to, a machine manufactured by defendant Food Machinery Corpora-

> tion), or on any other machine, and, in addition, I could break my sizes immediately between one bin and another, whether it was a quarter of an inch or an inch; I could jump from two inches to three inches in the next bin, practically."

Plaintiff made no substantial changes in the design of the grader, as originally conceived and manufactured by him from 1925 to 1928, and defendants, the Cutler partners, continued to manufacture that so-called Original Cook Grader throughout the 1928 season. Defendants made the Original Cook Grader until October 1, 1928. (F. W. Cutler).

Plaintiff's witness Reter stated that the machine had never given trouble in his plant and that he considers it "a very efficient machine". He first saw the Cook machine operating in July, 1927. He stated, "I ordered two of them and they were satisfactory, and the following year I wanted two more."

Plaintiff's witness Kyle testified that his company purchased two machines in 1925, that in 1928 he sold those two and bought three new Original Cooks, that the two first purchased were used continuously for three reasons, and that in 1929 he tried to get another Original Cook, but because it was not then being made, he purchased a Clear machine. Based on his use of the Original Cook he stated:

> "We have been satisfied with the results that we have gotten from the Cook. In fact, we are pleased." [201]

Plaintiff's witness J. Cook, who assisted in the manufacture of the Original Cooks and who continued on as an employee of the defendants, the Cutler partnership, to service machines, commented on the operation of the machine as follows:

> "Well, most of them the trouble was that people would not take care of their slides, would not set them right, adjust them to the size fruits, one thing and another like that . . . they was likely to get their guides out of line, the slides out of line and get them closer in so as to crowd the fruit out of place . . . and that would cause them to pinch the fruit lots of times. . . . There wasn't a thing wrong with it (the machine). It done good, accurate work if it was set accurate."

Plaintiff's witness Edmiston, whose company purchased plaintiff's first machine, stated that "the Original Cook will do very excellent work when it is properly operated" and that it worked "as satisfactorily as it was claimed it would". He added,

> "* * * I would say those machines never were satisfactory, because they were too expensive to operate, in my judgment."

One criticism made of the Original Cook was that it made it possible for persons packing from bins to "hog" fruit. The packers are paid on a piece work basis, and it is to their advantage to get as much fruit as possible in the bin at which they work. By a change in the adjustment of their individual

slide to widen the slot more fruit is deposited in that bin. This improper adjustment of one segment may cause jamming of fruit at the beginning of the next segment. (Reter; J. Cook; Edmiston). The Master asked plaintiff's witness Edmiston if the use of an adjusting screw, operable only with a master key, would not obviate the defect, and the witness stated that it [202] would.

Prior to 1927 fruit washers were not generally used, but in that season they came into general use in the Medford district. (F. W. Cutler; Cook).

In the washer the fruit is dipped in an acid solution, then passed through rinsing water, and then passed through a drier. The rinsing does not remove all trees of acid, and the drier does not remove all moisture. The result is that fruit passing from the washer to the grader carries over moisture containing some acid. (Reter; Edmiston; F. W. Cutler).

With the Original Cook Grader the fruit would gradually get the aprons wet. This had two effects. The acid solution tended to rot the aprons (J. Cook; Edmiston; F. W. Cutler), and the wetting of the aprons only, without wetting the canvas belts, caused the aprons to shrink and become a different length from that of the belts to which they were attached. This in turn caused some trouble because the belts tended to run untrue and tended to come off the pulleys. (F. W. Cutler; Edmiston; Cook).

Plaintiff's witness Reter stated that he avoided this problem by the use of acid resistant oil on the canvases, and had no operating difficulties because

of the use of washers. "Canvases had to be renewed about once every two years." Plaintiff's witness Edmiston likewise used oil, but, as he stated,

> "It didn't entirely solve the problem; it went a long way; * * * It probably reduced our cost of replacing belts, * * * oh, a great deal more than half."

Plaintiff's witness Reter stated, [203]

> "Well, there has been an occasional time when the belt has run a little sideways, or slipped, * * * in two seasons' operations we haven't had one five minutes shutdown of any kind."

Plaintiff's witness Edmiston stated that the wooden guides, when made with soft wood, alternately wet and dry, sometimes splintered and caught and tore the canvases; but no such trouble was encountered from guides made of hardwood. Plaintiff testified,

> "Occasionally somebody would jimmy one of the slides up and rip one of those aprons off, . . ."

Defendant F. W. Cutler stated that the canvases were "flimsy" and were frequently ripped, and tended to run off the pulleys.

Defendants F. W. Cutler and A. B. Cutler operated under the name of Cutler Manufacturing Company, a copartnership. In November, 1929, Cutler Manufacturing Company, Inc., was incorporated. In February, 1930, the partners transferred the business to the newly formed corporation. (F. W. Cutler).

The partnership and its successor did a general business of manufacture and sale of fruit handling machinery. Their products included a wide variety of machinery other than Cook Graders. As stated by plaintiff, the Cutlers, in general conversations with him, stated that they, the Cutlers, "were dominating things in the fruit machinery production in this territory". Likewise, plaintiff refers to "the ability and the fine organization, far flung sales organization" of the Cutlers.

In May, 1929, a Mr. Crummey, of John Bean Manufacturing Company, in a letter urging a merger of the Bean and Cutler [204] interests, refers to the "wide experience" of the Cutlers in the fruit machinery business.

The Cutler catalogue, issued in 1929, on the title page recites:

> "17 years continuous experience in the manufacture of fruit equipment."

Following those words is a map with lines pointing to Russia, Australia, Tasmania, New Zealand, England, Holland, Switzerland and South Africa. Then follows the statement:

> "The sun never sets on Cutler Graders."

In June, 1928, defendant partners published 1000 copies of a pamphlet advertising the Original Cook Grader, which were distributed to agents and prospective customers "where we thought the Cook could be sold". (A. B. Cutler).

The Improved Cook was shown in the defendants' 1929 catalogue along with other lines of machinery then being made, and likewise in the 1930 catalogue issued by "Cutler Manufacturing Company—Division Food Machinery Corporation".

With respect to their efforts to sell Cook Graders, defendant F. W. Cutler said:

> "There was no favoritism shown as between our own equipment and the Cook. We pressed sales of Cook machines just as hard as we pressed our own. We advertised them to the same extent. We had just as much at stake."

Fruit machinery business is seasonal. Manufacturers have to prepare for sales prior to the actual fruit season. Parts have to be acquired in advance. Cook machines were handled that way, "the same way we did the rest of our equipment". The fruit [205] machinery sales occur largely in "June, July and August; mainly in July and August". Materials for machines must be acquired, in most instances, in advance of orders for the machines.

Between May 4, 1928, and May 27, 1929, defendant partners expended $5,639.71 for the single item of labor, in their efforts to develop and improve the Cook Grader and put it on the market. Adding 60%, a conservative estimate, for factory overhead, the cost would amount to $9,023.54. In addition, there was a cost of material for which no record was kept. Likewise, there was expense for service men in the field servicing Cook Graders. (F. W. Cutler).

At the end of the 1928 season, in October of that year, the Cutler partnership ceased to manufacture and distribute the Original Cook Grader and began the experimental work which resulted in a grader of altered design which came to be known as the Improved Cook Grader. (A. B. Cutler; F. W. Cutler).

Late that year their California agent suggested to them that there was a profitable field in the citrus fruit industry for sizing of lemons. Up to that time no machine had been used successfully for sizing lemons. (F. W. Cutler).

Defendant F. W. Cutler stated that the two reasons for the change in design were, first, to adapt the machines to lemons, and second, to overcome operating defects in the Original Cook arising from the action of acid, incident to washing, on the canvas aprons. Of the two, the possibility of entering the lemon field was the "principal reason".

The design was altered in five principal respects. In the first place, the wooden parts were replaced with metal construction. Secondly, the canvas belt and aprons were replaced by metallic link chains and rubberized canvas respectively. Thirdly, the troughs through which the fruit moved were made [206] substantially steeper. Fourthly, a ripple device was placed on the side of the trough to move the fruit into a position so that the long axis would be parallel to the center line of the trough. Lastly, the means of adjusting the movable segment of the trough was changed. In the Original Cook the

guide, or movable segment, was constructed to move horizontally in and out in a direction perpendicular to the length of the trough. In the Improved Cook the movable segment was fixed on an axis at the upper edge, and the width of the aperture in the trough was varied by rotating the movable segment on that axis. (F. W. Cutler; Cook).

The rippling device consisted of small half-round strips of metal fixed on the sides of the trough. As the fruit was carried along the trough on the aprons it would encounter these slight obstructions under the apron and would tend to be moved into a position such that the long axis of the fruit would be parallel to the center line of the trough. (F. W. Cutler).

The experiments were being carried out in defendants' factory in Portland. (F. W. Cutler). Defendants A. B. Cutler and F. W. Cutler testified that late in 1928 plaintiff called at their plant and the machine in its then present stage was shown to him. Plaintiff testified that he did not see the new machine until February, 1929. When plaintiff saw the machine he indicated that he was satisfied with the change in design. (A. B. Cutler; F. W. Cutler; Cook).

The first Improved Cook was shipped on December 24, 1928, to Whittier, California (F. W. Cutler; Defendants' witness Van Wyk), and was put in service for sizing lemons. Representatives of the defendants superintended the installation and stayed on and observed the machine in operation.

The performance [207] of the machine for that purpose, after some changes made at the time of installation, was entirely satisfactory. (F. W. Cutler).

In defendants' catalogues advertising the Improved Cook, issued first in April, 1929 (A. B. Cutler), it is said:

> "After an entirely successful use of the Cook Grader in the field for three years, we have taken on the manufacture and sale of this highly satisfactory machine. We have added many improvements which put the Cook Grader in a class by itself for the efficient sorting of pears, peaches, plums, apricots, lemons and oranges.

On a subsequent page of the same catalogue under a heading, "The Cook Grader for sorting and sizing lemons," it is stated:

> "Lemons are a tender fruit and require very careful handling if injury is to be avoided. Previous to the use of the Cook Grader in the sorting and sizing of lemons, this fruit had been handled only on shallow trays, from which the lemons were sorted and sized by slow and costly hand methods. It had become generally considered that lemons could not be handled by machines, but the Cook Grader has successfully met all the exacting requirements.
>
> "Handles lemons without injury or bruising.
>
> "Sizes lemons very satisfactorily.
>
> "Will make a saving over hand methods of $25.00 to $30.00 a carload.

"Only machine on the market for sizing and sorting lemons.

"The Cook Grader succeeded where other machines failed." (Plaintiff's Exhibit 30, catalogue under name of "Cutler Manufacturing Company").

The same language is repeated in plaintiff's Exhibit 10, a catalogue issued in May, 1930, under the name "Cutler Manufacturing Company—Division Food Machinery Corporation". [208] (A. B. Cutler).

In the 1928 season defendants sold the Original Cook Grader. During that season they sold 28 graders, of which 15 were delivered to users in the Medford district in Oregon, 6 to the Hood River district in Oregon, 2 to California, and 5 to Washington. (Defendants' Exhibit 3, Schedule A).

After the end of the 1928 season, up to May 1, 1929, defendants sold 5 improved Cooks, all to users engaged in the citrus fruit business in California. (Defendants' Exhibit 3, Schedule A). The exhibit shows six sales, but one sale there shown is erroneously listed as a grader. (Van Wyk).

Between May 1, 1929, and December 31, 1929, defendants sold 16 Improved Cooks, distributed as follows: 2 to Medford, Oregon; 1 to Hood River, Oregon; 2 to California; 4 to Washington; 4 to Buenos Aires, South America; and 3 to Capetown, South Africa. (Defendants' Exhibit 3, Schedule C). The Capetown sales were to a machinery dealer, rather than to a user. (Van Wyk).

After January 1, 1930, defendants sold 6 Improved Cooks, 2 to California in January, 1930, 1 to California in February, 1 to Idaho in May, 1 to Hood River, Oregon, in August, and the final sale of 1 to Hood River in September. (Defendants' Exhibit 3, Schedule D).

The identical machine developed for lemons as the Improved Cook was thereafter used for pears. (A. B. Cutler). As stated by defendant F. W. Cutler:

> "It was assumed on our part that, of course, if they (the Improved Cook) worked so satisfactorily in the field with lemons they would work on pears. But much to our surprise, when we got the first machine in operation in Medford, we found that a different condition presented itself with pears than with lemons. We apparently had overlooked the fact that pears are [209] much heavier than lemons and average much bigger. . . . But with the pears we found that in the large sizes especially, with the trough as we had it, steep at that time and hinged at the top and pulling away, . . . that the weight of that pear caused a lag or friction of the rubberized curtain at its lower edge where the pear contacted, . . . and . . . produced a tendency to draw that curtain, and occasionally a pear would be left high and dry, . . . on the bare rails, the curtain having pulled it from underneath, it flipped it over, and there would lie the pear bare on the rail, and the curtains

> when coming out would pass over on top of that obstruction, and other pears coming along would cause a jam. That led to troubles in the curtains, and that led to trouble with the chain on those particular machines."

He stated further that his principal efforts at that time were to "see them (the users) through their season" and,

> ". . . we were accorded the privilege of revising those machines at the end of the season. We corrected the troubles by putting in a different type of trough less steep, and one which did not swing away as illustrated here in the exhibit, creating a steeper trough in the larger sizes, but one which pulled back, more or less the same idea as used on the original Cook, . . . We have never had any of that trouble at all on the lemon machines in California. Conditions apparently are different. All the later machines after 1930 were made of the same type as the machines in Medford were altered."

Plaintiff's witness White described the action of the Improved Cook as first used for pears, in the following language:

> "Well, in the deeper trough the fruit had more of a tendency to get under the belt. The curtains worked over the top of the fruit."

As a result the belts "tangled" and were thrown off the sprockets, and thereby the curtains were torn from the chains. The deep trough had to be changed.

Defendants' service men endeavored to obviate the difficulties, but the defects were not entirely [210] remedied before the 1930 season.

Plaintiff's witness Edmiston stated that when the Improved Cook began to be used for pears it was quickly found that the trough was too steep and caused pears to wedge. It caused a "great deal of trouble" in the 1929 season, and was "very unsuccessful". The machine was altered by defendants at their own expense in the spring of 1930. As so altered, the machine is "very much" better than the Original Cook. The new machine is less expensive to operate, it has greater capacity, the rippling process is satisfactory, and with more bins the new machine can be adjusted more finely.

Plaintiff, in his comments on the design of the Improved Cook as first used for pears, spoke particularly of the fact that the movable segment was hinged so that the lower end moved in an arc. As a consequence the two lower edges of the trough were not upon the same level. Fruit passing down the trough became "lopsided", which caused jamming.

When the Cutler partnership, A. B. Cutler and F. W. Cutler, transferred the partnership assets to the Cutler corporation on February 14, 1930, the partners, as such, ceased to manufacture and distribute Cook Graders. (F. W. Cutler). However, as stated by F. W. Cutler, the partners thereafter caused their successors, the Cutler corporation and Food Machinery Corporation, to assemble and sell the Cook Grader parts on hand on that date. The same witness stated:

"On February 14th the partnership ceased operations; February 14th, 1930, the partnership as it had been operating in the past ceased operation because it sold its plant and equipment with which to manufacture. Remaining on hand at that time were certain parts of Cook Graders, which the contract with Mr. Floyd Cook gave us the right to manufacture [211] and clean up the stock to the extent of ten machines after discontinuance of our contract with him. Based on that provision and that right we caused to have those extra parts manufactured for us and they were sold to clean out that stock."

The Cutler Corporation manufactured no Cook Graders after June 30, 1930. (F. W. Cutler).

The efforts of defendants, the partnership, to market Cook Graders continued throughout 1929, and in January and a part of February, 1930. Thereafter the efforts of the successors of the partnership continued to dispose of the parts on hand received from the partnership. (F. W. Cutler).

The sales of Cook Graders actually made in 1930 were described in detail by defendants' witness Van Wyk. The sales are tabulated in defendants' Exhibit 3, and were as follows:

Date Shipped	Purchaser	Address	No. of Graders
1930			
Jan. 11,	Oxnard Citrus Assn.	Hueneme, California	2
Feb. 28,	Crocker-Sperry	Santa Barbara, Calif.	1
May 24,	Riverside Orchard Co.	Lewiston, Idaho	1
Aug. 13,	Duckwall Bros.	Hood River, Oregon	1
Sept. 10,	Apple Growers' Assn.	Hood River, Oregon	1
		Total	6

Defendants' Exhibit 3, witness Van Wyk, shows defendants' accounting of royalties and commissions earned by and paid to plaintiff during the periods covered thereby. The data therein shown is summarized as follows:

Schedule A—Royalty Statement on sales of Cook Graders May 1, 1928, to April 30, 1929.

1. Number of graders sold	34
2. Total amount of sales,	$28,500.60
3. Deductions for material other than graders included in sale (detailed in Schedule E),	2,312.60
	[212]
4. Gross sale after deduction,	$26,188.00
5. Special discounts granted to certain buyers,	197.85
6. Net sales after discounts,	25,990.15
7. 10% Royalty,	2,599.01

Schedule B—Commissions on sales Medford District—Year 1928.

1. Total sale price Cook Graders, sold,	$16,189.00
2. Commissions earned on (1),	1,965.22
3. Total sale price of equipment other than Cook Graders and attachments,	8,300.30
4. Commissions on (3),	1,245.04

In the foregoing summary item (3) includes the sale price only of equipment, other than Cook Graders and attachments, actually sold by plaintiff under defendants' contention that the so-called "outside contract" did not contemplate payment of commissions to plaintiff on any sales other than those actually made by plaintiff. It does not include sales in the Medford district in 1928 where defendants' records do not show that plaintiff, as salesman, actually negotiated the sale. (Van Wyk).

The Master found (and no exception was taken thereto) that additional royalties should be credited to plaintiff for royalties for graders sold in 1928, in addition to those shown in Schedule A, as follows:

Invoice	Customer	Additional Royalty
9464	Kleinsorge	$ 29.94
9502	Pinnacle Packing Co.	28.50
9583	Kleinsorge	29.25
10024	Apple Growers Assn.	14.50
	Total	$102.19 [213]

Schedule C—Royalty Statement on sales of Cook Graders May 1, 1929, to December 31, 1929.

1. Number of graders sold,	16
2. Total amount of sales,	$20,347.03
3. Deductions for material other than graders included in sale (See Schedule E),	3,373.53
4. Gross sale after deductions,	16,973.50
5. Special discounts granted to certain buyers,	985.02
6. Net sales after discounts,	15,988.48
7. 10% Royalty,	1,598.85

Schedule D—Royalty Statement on sales of Cook Graders, 1930.

1. Number of graders sold,	6
2. Total amount of sales,	$10,137.30
3. Deductions for materials other than graders included in sale (See Schedule E),	1,907.80
4. Gross sale after deduction,	8,229.50
5. Special discounts granted certain buyers,	137.87
6. Net sales after discounts,	8,091.63
7. 10% Royalty,	809.16

The Master found (and no exception was taken thereto) that additional royalties should be credited to plaintiff for royalties on graders sold during the period from May 1, 1929, to the end of the period covered by defendants' sales, in the amount of $15.00, being two items of $7.50 each.

Defendants' Exhibit 3, page 1, likewise shows payments made by defendants to plaintiff, classified by witness Van Wyk, who presented the exhibit, as follows: [214]

Date	Under Contract	Outside of Contract	Grand Total
1928			
June 5,	$ 300.00		
30,	300.00		
July 5,		$ 8.66	
17,		8.28	
Aug. 1,	300.00		
31,		1,000.00	
31,	300.00		
Oct. 1,	300.00		
31,	300.00		
Dec. 1,	300.00		
24,	1,909.94	224.88	
1929			
Jan. 2,	300.00		
Feb. 1,	300.00		
Mar. 1,	300.00		
Apr. 1,	300.00		
May 1,	300.00		
Feb. 25,		3.22	
Sub-total	$5,509.94	$1,245.04	$6,754.98
1930			
Jan. 27,	1,818.50		
July 9,	465.46		
9,	465.47		
Sub-total	$2,749.43		$2,749.43
Grand total	$8,259.37	$1,245.04	$9,504.41

The item of $3.22 on February 25, 1929, was a charge for freight on material ordered by plaintiff for a customer, and refused by the customer. (Van Wyk). The Master found that that was an improper charge against plaintiff, and no exception to that finding was made by any of the parties.

Plaintiff's Exhibit 60, witness Wright, is a tabulation made by the witness from the records of defendants, the partners, and Cutler corporation. (Wright). Included therein is the data relating to sales by defendant partnership in the [215] Medford district in 1928 of material other than Cook Graders and attachments. Sales of materials shown therein, but not included in the tabulations of defendants' Exhibit 3, are as set forth in the Master's Report, and Exhibit B thereto.

Between May 4, 1928, and December 24, 1928, sales by the defendants, the partners, of Cook Graders in all territories, of Cook Graders and attachments in the Medford district only, and of material other than Cook Graders and attachments in the Medford district only, were as follows:

	Between 5/4 and 8/31/28	Between 5/4 and 12/24/28
1. Sales of Cook Graders in all territories on which 10% royalty was due (Defendants' Exhibit 3, Schedule A),	$18,711.75	$19,584.15
2. 10% royalty on total Item (1)	1,871.17	1,958.41
3. Sales of Cook Graders and attachments in Medford district only on which defendants were to pay commission (Defendants' Exhibit 3, Schedule A),	16,189.00	16,189.00
4. Commission due on Item (3) Per Defendants' Exhibit 3, Schedule A,	1,965.22	1,965.22
5. Sales of material in Medford district other than Cook Graders and attachments, upon which commissions were due, as shown in Defendants' Exhibit 3, Schedule A,	8,300.30	8,300.30
6. Commissions due on Item (5) per Defendants' Exhibit 3, Schedule A,	1,245.04	1,245.04
7. Sales of material in Medford district other than Cook Graders, not included in Defendants' Exhibit 3, but shown in Plaintiff's Exhibit 60,	1,552.90	2,133.56
8. 15% of Item (7),	232.94	320.03

On August 31, 1928, defendant partners paid plaintiff $1,000.00. This payment is shown in defendants' Exhibit 3 as [216] a payment on commissions due on sales of material other than Cook Graders and attachments in the Medford district.

The occasion for this payment of $1,000.00 was described by defendants' witness Van Wyk, as follows:

"Q. . . . What was that $1000.00 for?

A. That was an advance on commissions.

Q. Commisisons only, or commissions and royalties?

A. At that time it was given for commissions only."

"Yes, I remember Mr. Cook asking whether he could not have a settlement on his commission account, and I informed him at the time that it was difficult during our rush season to get up a detail, but that according to our records he possibly was entitled to an advance of somewhere around a thousand dollars, which was given to him at that time, covered by our check A-2008 on August 31st."

"Q. . . . Was that (the $1000.00 payment) on the basis of something earned, or an advance?

A. That was an advance."

"The check was issued as an advance on commissions which we considered due Mr. Cook at the time."

Plaintiff testified as to the occasion for the payment as follows:

"Q. Now, as I understand it, that had nothing to do with the royalty part of the business, but had sole reference to this sales commission of fifteen percent? . . .

A. It was a payment on account of what they owed me at that time.

Q. Of all items of every nature; is that what you mean?

A. Yes, sir; whatever I had coming to me; that was a payment on account of whatever I might have had coming to me at that time."

On December 24, 1928, defendant partners paid plaintiff [217] $2,134.82 in a single check, which is distributed in defendants' Exhibit 3 as $1,909.94 on royalties and commissions due under the written contract of May 5, 1928, and $224.88 on commissions due outside of the written contract. This payment was explained by defendants' witness Van Wyk as follows:

"Q. . . . under date of December 24th you have a check, apparently one check, covering two amounts, $1909.94 in the column 'Under Contract' and $224.88 in the column 'Outside of Contract'. What was this 'Outside of Contract' item for? . . .

A. It was payment for commissions and royalties, as I remember it.

Q. Well, that is, the whole check was?

A. Yes, it was merely divided up as a matter of segregating the commissions from the royalties. . . .

A. In making up this statement I attempted to segregate the royalties from the commissions, and therefore made these two headings, one 'Under Contract' and the other 'Outside of Contract.' "

Plaintiff's witness Reter discussed the extent to which Pacific Coast fruit districts are supplied

with sizers. In the Medford district in Oregon there is still one house that sorts by hand, but he could name no houses in the Hood River district in Oregon or the Wenatchee district in Washington that were not equipped with sizers. In those California districts devoted exclusively to pears "there is still a volume of fruit packed without any sizing equipment". In 1928, 1929 and 1930 there should have been a good market for machines to size lemons, because up to that time the universal practice had been to size by hand.

In 1928 it was not customary to use sizers for pears [218] in the Wenatchee and Yakima districts in Washington. (Cook).

Defendant F. W. Cutler stated that the three factors which determine the market for fruit machinery are the size of the crop, the financial condition of prospective purchasers, and the degree of saturation of the market. The year 1930 was a disastrous one financially in the pear districts. In 1931 the pear crop was small, but the return was "fairly advantageous compared with other fruit". In Hood River they had "only a fairly good crop and fairly good prices". The financial conditions of the fruit grower indirectly affect the ability of the packer to purchase machinery.

Defendants' witness Van Wyk stated that, as sales manager for defendants, he did not notice a shortage of cash available for equipment prior to 1930, "but during 1930 we ran into it". Sales had to be made on easier terms. The year 1931 was

worse than 1930. On the Pacific Coast fresh fruit is not yet all sized by machine. "No, indeed not. Similar to apples, a great deal of it is still done by the packer himself or herself. . . . It is done by eye." In the Yakima district a considerable number of sorting belts, as distinguished from sizing machines, are used for both apples and pears. East of the Rocky Mountains, pears are usually packed loose. Some sizing may be done, but machines are not used.

Defendants' witness Van Wyk presented defendants' Exhibit 10, containing two graphs of sales by the Stebler-Parker Company, Sprague-Sells Company, John Bean Manufacturing Company and Cutler Manufacturing Company, four of the constituent divisions of Food Machinery Corporation. The data shown therein covers only sales of machines for grading pears. No manufacturers in the United States, other than the four [219] named, manufacture a pear grader. The data shown in the graphs, reduced to tabular form, is as follows:

Pear Grader Sales (Dollars)

Year	Total Sales Four Companies	Total Sales Cutler	Total Sales Three Companies (Exhibit of Cutler)
1925	$ 6750		$ 6750
1926	12075		12075
1927	30417		30417
1928	47445	$19585	27860
1929	36808	22393	14415
1930	18416	8091	10325
1931	21660		21660

Pear Grader Sales (Numbers of Machines)

Year	Total Sales Four Companies	Total Sales Cutler	Total Sales Three Companies (Exhibit of Cutler)
1925	25		25
1926	45		45
1927	122		122
1928	107	28	79
1929	42	22	20
1930	26	6	20
1931	20		20

Cutler Manufacturing Company manufactured and sold no pear grader prior to the commencement of manufacture and sale of the Cook Grader in 1928 (A. B. Cutler), and sold no pear grading machine after 1930. (Van Wyk).

Plaintiff's Exhibit 24 is a statement made by John Bean Manufacturing Company, a division of defendant Food Machinery Corporation, showing sales of "Clear" V-type sizers by that division as follows (F. W. Cutler):

From	To	Number	Price
Feb. 28, 1929	March 29, 1930	12	$12,450.00
Mar. 30, 1930	June 25, 1930	4	5,400.00
June 26, 1930	Oct. 31, 1931	14	19,960.00
	Total	30	$37,900.00

[220]

Plaintiff's Exhibit 25 is a statement by Citrus Machinery Co. (by Fred Stebler), likewise a division of Food Machinery Corporation, showing sales

of "Clear" V-type sizers by that division as follows (F. W. Cutler):

From	To	Number	Price
Feb. 28, 1929	March 29, 1930	0	
Mar. 30, 1930	June 25, 1930	4	$ 2,530.00
June 26, 1930	Oct. 31, 1931	25	17,887.12
	Total	29	$20,417.12

The Citrus Machinery Company is listed in Plaintiff's Exhibit 17 (an article announcing the proposed merger which later became Food Machinery Corporation) as Florida Citrus Machinery Company.

Defendants' Exhibit 6, a letter written by one Crummey, of John Bean Company, to defendant F. W. Cutler, on May 28, 1928, urging the Cutlers to merge with the Bean Company, says in part:

> "After our dinner to the citrus industry in Los Angeles next Wednesday Mr. Stebler and I expect to visit the citrus districts in Texas and Florida. I feel sure that together we will render a greatly improved service over anything heretofore known to the citrus industry."

Plaintiff's witness Newman, agricultural statistician, Bureau of Agricultural Economics, United States Department of Agriculture, gave figures from the department year book, Crops and Markets, for production of pears, as follows:

	1928	1929	1930	1931
Production, bushels (000 omitted)				
Oregon	2,700	2,750	3,200	1,955
Washington	3,700	3,322	4,463	3,650
California	9,355	7,917	11,334(1)	8,917(1)

[221]

	1928	1929	1930	1931
Carload shipments, by years beginning July 1				
Oregon	4,437	4,211	5,116	2,678(2)
Washington	5,686	4,035	6,157	4,457(2)
California:				
Northern Division	8,044	6,936	9,711	
Central & Southern Division	2,959	2,529	3,780	2,213(2)(3)

(1) Includes some quantities not marketed on account of market condition as follows: 1930—1,292; 1931—458.

(2) 1931 carload figures only July 1, 1931, to January 1, 1932.

(3) Includes only central division.

Carload data do not differentiate between boxed fruit and shipments to canneries, and to extent that some pears may be shipped twice, there are duplications.

The pear season in the Medford district begins about August first. (Kyle). The pear season on the Pacific Coast ends about October 1st. The lemon season is December and January. (F. W. Cutler). [222]

THIS IS TO CERTIFY that the foregoing statement of evidence is hereby allowed and approved and declared that the same contains a statement of all of the evidence in said cause bearing the questions involved in the appeal in this cause, that said portions of said evidence which are repro-

duced in the exact words of the witnesses are so produced at the request of one or the other of the parties to said cause and by direction of the Court in order to properly present the effect thereof. The said statement of the evidence is hereby ordered filed as a statement of the evidence to be included in the record on appeal in the above entitled cause as provided in Paragraph (b) of Equity Rule 75.

Done and dated in open Court this 21st day of March, 1934.

JOHN H. McNARY,
United States District Judge for
the District of Oregon.

To the Judge of the above entitled Court:

The undersigned, solicitors for the plaintiff in the above entitled cause, hereby certify that the foregoing statement of evidence contains all amendments and additions to the form of statement of evidence prepared by the defendants and appellants, and said plaintiff hereby waives additional time to file objections, amendments or requests for additional parts of the record to be made a part of said statement and consents that the Court may certify said statement at any time after the presentation thereof to him for certification, without awaiting the time provided by rule of Court.

CAREY, HART, SPENCER & McCULLOCH,
Solicitors for Plaintiff.

[Endorsed]: Filed March 21, 1934. [223]

AND AFTERWARDS, to wit, on the 16th day of March, 1934, there was duly filed in said Court, a Petition for Appeal, in words and figures as follows, to wit: [139]

[Title of Court and Cause.]

PETITION ON APPEAL.

Come now defendants Asa B. Cutler and Frank W. Cutler, co-partners doing business under the name of Cutler Manufacturing Co., Cutler Manufacturing Company, Inc., an Oregon corporation, and Food Machinery Corporation, a Delaware corporation, defendants in the above entitled cause, and conceiving themselves to be aggrieved by the decree of the above entitled Court, made and entered in the above entitled cause on the 20th day of December, 1933, do and each of them does hereby appeal from said decree so entered herein and from the whole thereof, and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, and pray that their appeal be allowed and that a transcript of the record and proceedings and papers upon which said decree was based, duly authenticated, be sent to the United States Circuit [140] Court of Appeals for the Ninth Circuit, sitting at San Francisco, under the rules of such Court in such cases made and provided.

It is further stated that whereas no money decree is assessed against the Food Machinery Corporation said decree provides for levying execution against the property coming into the hands of the Food

Machinery Corporation which was formerly the property and assets of the other defendants, and Food Machinery Corporation joins in this appeal to the extent that the said decree is against it and for the purpose of completing, maintaining and preserving the record on said appeal, and your petitioners further pray that the proper order relating to the required security to be required of them be made.

ASA B. CUTLER,
By James G. Wilson, John F. Reilly,
His Solicitors.

FRANK W. CUTLER,
By James G. Wilson, John F. Reilly,
His Solicitors.
Individually and as co-partners doing business as Cutler Manufacturing Co.

CUTLER MANUFACTURING COMPANY, INC.,
an Oregon Corporation.
By James G. Wilson, John F. Reilly,
Its Solicitors.

FOOD MACHINERY CORPORATION,
a Delaware Corporation.
By James G. Wilson, John F. Reilly,
Its Solicitors.

[Endorsed]: Filed March 16, 1934. [141]

AND AFTERWARDS, to wit, on the 16th day of March, 1934, there was duly filed in said Court, an Assignment of Errors, in words and figures as follows, to wit: [142]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Asa B. Cutler and Frank W. Cutler, individually and co-partners under the name of Cutler Manufacturing Co., Cutler Manufacturing Company, Inc., an Oregon Corporation, and Food Machinery Corporation, appellants, hereby submit and herewith file their

ASSIGNMENT OF ERRORS.

asserted and intended to be urged in the United States Circuit Court of Appeals for the Ninth Circuit, and say that in the record and proceedings aforesaid there is manifest error in this:

I.

That the Court erred in finding, holding and deciding that under the contract of May 4, 1928, and particularly Para- [143] graph Eleventh thereof that if the defendants Asa B. Cutler and Frank W. Cutler should sell their business, they, the said Asa B. Cutler and Frank W. Cutler, were obligated to continue to manufacture the Cook Grader, and on failure so to do it was a breach of said contract of May 4, 1928.

II.

That the Court erred in holding and deciding that Paragraph Eleventh of the contract of May 4, 1928

was a cumulative remedy made available to the plaintiff and did not prescribe the exclusive remedy open to the plaintiff in the event the defendants Asa B. Cutler and Frank W. Cutler should sell their business, and in not limiting the plaintiff to his right to cancellation of said contract and the taking back of all rights under said patent on the happening of the event of sale and the inability of the said plaintiff to persuade the said purchaser to manufacture the Cook Grader to the exclusion of any competing machine.

III.

That the Court erred in not holding and deciding that the parties had prescribed in their contract the exclusive rights of the said parties in the event of the sale of the business by Asa B. Cutler and Frank W. Cutler.

IV.

That the Court erred in holding that said contract, and particularly Paragraph Eleventh thereof, did not permit the defendants Asa B. Cutler and Frank W. Cutler to sell their business without incurring a penalty as for the breach of said [144] contract.

V.

That the Court erred in holding that under Paragraph 7 of said contract the parties contemplated that the royalties and commissions thereunder should at least equal the sum of $15,000.00 up to October 1, 1931, and measuring the damages of the

plaintiff up to that point by the difference between the amount of royalties and commissions paid under said contract and the said sum of $15,000.00.

VI.

That the Court erred in holding and deciding that because no notice was given by the defendants to the plaintiff on or about October 1, 1931 of the cancellation of said contract that said contract continued in effect until October 1, 1933.

VII.

That the Court erred in holding and deciding that the general damages sustained by the plaintiff until October 1, 1933 amounted to the sum of $5,000.00.

VIII.

That the Court erred in failing to hold and decide that there was no evidence to sustain any general damages and that the damages should have been limited, if any, to the amount of royalties which would have been earned up to and including the 1st day of October, 1931.

IX.

That the Court erred in not holding and deciding that by the commencement of said action prior to the 1st day of October, 1931 that said defendants elected to treat the sale of said business by the defendants Cutler and Cutler Manufacturing Company as a breach of said contract and that his damage was limited to actual damages consisting of the amount of royalties [145] which he would have earned up to October 1, 1931.

X.

That the Court erred in holding and deciding that no notice of cancellation of said contract was given and that the commencement of said action was not a waiver on the part of the plaintiff of any written notice of such cancellation on and after October 1, 1931.

XI.

That the Court erred in holding that the finding of the Master that the general damages should be assessed at $5,000 is supported by material and adequate evidence and in failing to hold that there was no evidence of any general damages.

XII.

That the Court erred in overruling and denying Exception No. 1 submitted by the defendants to the Master's Report.

XIII.

That the Court erred in overruling and denying Exception No. 2 submitted by the defendants to the Master's Report.

XIV.

That the Court erred in overruling and denying Exception No. 3 submitted by the defendants to the Master's Report.

XV.

That the Court erred in overruling and denying Exception No. 4 submitted by the defendants to the Master's Report.

XVI.

That the Court erred in overruling and denying Exception No. 5 submitted by the defendants to the Master's report.

XVII.

That the Court erred in overruling and denying Exception No. 6 submitted by the defendants to the Master's Report. [146]

XVIII.

That the Court erred in overruling and denying Exception No. 7 submitted by the defendants to the Master's Report.

XIX.

That the Court erred in deciding said case in favor of the plaintiff and against the defendants.

XX.

That the Court erred in failing to find in favor of the defendants Asa B. Cutler and Frank W. Cutler and Cutler Manufacturing Company, Inc., on their counterclaim pleaded in their answer.

XXI.

That the Court erred in decreeing any right to issue execution against any property acquired by the Food Machinery Corporation from the other defendants in said cause in the event execution against the other defendants should be returned unsatisfied.

XXII.

That the Court erred in not decreeing that said contract of May 4, 1928 lacked mutuality in that it

recognized the right of the defendants Cutler to sell their business and as interpreted gave to the plaintiff an option to cancel the contract without any corresponding right on the part of the defendants Cutler.

XXIII.

That the Court erred in not holding and deciding that the so-called agency contract of the plaintiff at Medford for the year 1928 did not give the plaintiff the right to a commission on all sales in the Medford district during said year, but gave to the plaintiff only the right to a commission upon sales made [147] or induced by the plaintiff.

XXIV.

That the Court erred in not decreeing the costs in this case in favor of the defendants and against the plaintiff, and particularly the Court erred in not decreeing costs in favor of the Food Machinery Corporation.

XXV.

That the Court erred in the event that the said decree should be affirmed in any particular in not decreeing to the defendants and against the plaintiff costs and disbursements, and particularly reporter's fees, and the cost of the transcript for the taking of all testimony on the issues decided in favor of the defendants.

And the said defendants Asa B. Cutler and Frank W. Cutler, individually, and as co-partners, and Cutler Manufacturing Company, Inc., an Oregon corporation, and Food Machinery Corporation,

a Delaware corporation, respectfully pray that the decree, order and judgment aforesaid may be reversed.

ASA B. CUTLER,
FRANK W. CUTLER,
Individually and as co-partners under the firm name of Cutler Manufacturing Co.
By Wilson & Reilly,
Their Solicitors.
CUTLER MANUFACTURING COMPANY, INC.,
By Wilson & Reilly,
Its Solicitors.
FOOD MACHINERY CORPORATION,
By Wilson & Reilly,
Its Solicitors.

JOHN F. REILLY,
JAMES G. WILSON,
Solicitors for defendants
and Appellants.

[Endorsed]: Filed March 16, 1934. [148]

AND AFTERWARDS, to wit, on Friday, the 16th day of March, 1934, the same being the 11th Judicial day of the Regular March Term of said Court; present the Honorable John H. McNary, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [149]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

And now, on this 16th day of March, 1934,

IT IS ORDERED that the appeal of the defendants in the above entitled cause, to wit: Asa B. Cutler and Frank W. Cutler, co-partners doing business under the name of Cutler Manufacturing Co., Cutler Manufacturing Company, Inc., an Oregon corporation, and Food Machinery Corporation, a Delaware corporation, be allowed as prayed for, and

IT IS FURTHER ORDERED that a bond in the sum of $750.00 in form and with sureties approved by the Court, be given for the payment of all costs which may be hereafter assessed against said defendants and appellants in the United States Circuit Court of Appeals for the Ninth Circuit, and conditioned that the said defendants and appellants will prose- [150] cute such appeal to effect and answer all costs if they or either of them fail to procure a reversal of said decree by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated March 16th, 1934.

JOHN H. McNARY,
Judge of the District Court of the United States for the District of Oregon.

[Endorsed]: Filed March 16, 1934. [151]

AND AFTERWARDS, to wit, on the 16th day of March, 1934, there was duly filed in said Court, a Bond on Appeal, in words and figures as follows, to wit: [152]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, Asa B. Cutler and Frank W. Cutler, individually, and as co-partners doing business under the firm style and name of Cutler Manufacturing Co., Cutler Manufacturing Company, Inc., an Oregon corporation, and Food Machinery Corporation, a Delaware corporation, as principals, and Paul Van Wyk, as surety, are held and firmly bound unto Floyd J. Cook, plaintiff in the above entitled cause, jointly and severally, in the sum of $750.00 to be paid to the said Floyd J. Cook, his heirs, representatives and assigns, to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our heirs, representatives, successors and assigns, firmly by these [153] presents.

Sealed with our seals and dated this 16th day of March, 1934.

WHEREAS, the above named defendants, Asa B. Cutler and Frank W. Cutler, individually and as co-partners doing business under the firm style and name of Cutler Manufacturing Co., Cutler Manufacturing Company, Inc., an Oregon corporation, and Food Machinery Corporation, a Delaware corporation, have appealed to the United States

Circuit Court of Appeals for the Ninth Circuit to reverse the decree and judgment in the above entitled cause by the District Court of the United States for the District of Oregon, dated, signed and entered the 20th day of December, 1933,

NOW THEREFORE, the condition of this obligation is such that if the above named defendants Asa B. Cutler and Frank W. Cutler, individually and as co-partners under the name of Cutler Manufacturing Co., Cutler Manufacturing Company, Inc., an Oregon corporation, and Food Machinery Corporation, a Delaware corporation, appellants, shall prosecute said appeal to effect and answer all costs awarded against them, or either of them, if they, or either of them, shall fail to make good their plea than then this obligation shall be void, otherwise to remain in full force and virtue.

President.

ASA B. CUTLER
FRANK W. CUTLER
Individually and as co-partners under the firm name of Cutler Manufacturing Co.

[Seal] CUTLER MANUFACTURING COMPANY, INC.
By Asa B. Cutler
President.
Attest: Paul Van Wyk
Secretary. [154]

[Seal] FOOD MACHINERY CORPORATION
By F. W. Cutler
Vice President.
Principals.

[Seal] PAUL VAN WYK
Surety.

State of Oregon,
County of Multnomah.—ss.

On the 16th day of March, 1934, personally appeared before me Paul Van Wyk, known to me to be the individual described in and who executed the foregoing instrument as surety, and acknowledged that he executed the same as his free act and deed for the purposes therein set forth, and said Paul Van Wyk being by me duly sworn did say that he is a resident and householder of the County of Multnomah, State of Oregon, and that he is worth the sum of $1500.00 over and above his just debts and legal liabilities and property exempt from execution.

IN TESTIMONY WHEREOF, I have hereunto set my hand and Notarial Seal the day and year first above in this my certificate written.

F. D. HUNT, JR.,
Notary Public for Oregon.

My Commission expires: Feb. 9, 1937.

The foregoing bond is approved both as to sufficiency and form this 16th day of March, 1934.

JOHN H. McNARY,
Judge.

[Endorsed]: Filed March 16, 1934. [155]

AND AFTERWARDS, to wit, on the 21st day of March, 1934, there was duly filed in said Court, a Praecipe for Transcript, in words and figures as follows, to wit: [224]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT.

To the Clerk of the above entitled Court:

You will please prepare and certify to constitute the record on appeal in the above case the transcript of the following, omitting endorsements, acceptances of service, etc., the record to be printed in San Francisco:

(1) Praecipe.

(2) Bill of Complaint.

(3) Answer of Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc. (Note: The answer of Food Machinery Corporation is omitted for the reason that as far as the questions on appeal of this cause are concerned its answer to the complaint with the answer of Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc.) Please omit Exhibits attached to Answer. [225]

(4) Reply to answer of Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc. (Note: Reply to answer of Food Machinery Corporation is omitted for the reason that as far as the questions on appeal herein are concerned it is identical with that of the reply to the answer of Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc.)

(5) Statement of the Evidence.

(6) Master's Report.

(7) Plaintiff's Exceptions to Master's Report.

(8) Exceptions of Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc. to Master's Report.

(9) Exceptions of Food Machinery Corporation to Master's Report.

(10) Memorandum Opinion of Court.

(11) Objections of Asa B. Cutler, F. W. Cutler and Cutler Manufacturing Company, Inc. to proposed Findings of Fact and Conclusions of Law.

(12) Order overruling objections of Asa B. Cutler, et al, to Findings of Fact and Conclusions of Law.

(13) Findings of Fact and Conclusions of Law.

(14) Final Decree.

(15) Petition of Defendants for Appeal.

(16) Order allowing Appeal and Fixing Bond.

(17) Bond on Appeal.

(18) Defendants and Appellants Assignment of Errors.

(19) Citation on Appeal.

JOHN F. REILLY
JAMES G. WILSON
Solicitors for Defendants and Appellants, Asa B. Cutler, F. W. Cutler, Cutler Manufacturing Company, Inc. and Food Machinery Corporation.

[Endorsed]: Filed March 21, 1934. [226]

[Title of Court and Cause.]

CITATION.

The President of the United States of America.

To Floyd J. Cook:

Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to a notice of appeal and order of the Court allowing the same, filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein yourself Floyd J. Cook is the plaintiff and Asa B. Cutler and Frank W. Cutler, co-partners doing business under the name of Cutler Manufacturing Co., Cutler Manufacturing Company, Inc., an Oregon [1] corporation, Food Machinery Corporation, a Delaware corporation, formerly known as John Bean Manufacturing Company, F. W. Cutler, Director, General Agent and Attorney in Fact within the State of Oregon for Food Machinery Corporation and Cutler Manufacturing Company, a division of Food Machinery Corporation, are defendants, to show cause, if any there be, why the decree and judgment rendered against the defendants and in favor of yourself, as plaintiff, should not be corrected and speedy justice be done to the parties in that behalf.

WITNESS the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States of America, this 16th day of March, 1934.

JOHN H. McNARY,

United States District Judge

Due and personal service of the above citation, and the receipt of a copy thereof, is hereby admitted this 16th day of March, 1934.

CAREY, HART, SPENCER & McCULLOCH,
Solicitor for Complainant,
Floyd J. Cook.

[Endorsed]: Filed Mar. 16, 1934. [3]

United States of America,
District of Oregon.—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from 4 to 226 inclusive, constitute the transcript of record upon the appeal in a cause in said court, in which Floyd J. Cook is plaintiff and appellee, and Asa B. Cutler and Frank W. Cutler, co-partners doing business under the name of Cutler Manufacturing Company, Cutler Manufacturing Company, Inc., an Oregon corporation, Food Machinery Corporation, a Delaware corporation, are defendants and appellants; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said appellant, and has been by me compared with the original thereof, and is a full, true and complete transcript of the record and proceedings had in said Court in said cause, in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is $38.65, and that the same has been paid by the said appellant.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 31st day of March, 1934.

[Seal] G. H. MARSH,
Clerk. [227]

[Endorsed]: No. 7454. United States Circuit Court of Appeals for the Ninth Circuit. Asa B. Cutler and Frank W. Cutler, co-partners doing business under the name of Cutler Manufacturing Co., Cutler Manufacturing Company, Inc., an Oregon corporation, Food Machinery Corporation, a Delaware corporation, formerly known as John Bean Manufacturing Company, F. W. Cutler, Director, General Agent and Attorney in Fact within the State of Oregon for Food Machinery Corporation, and Cutler Manufacturing Co., a division of Food Machinery Corporation, Appellants, vs. Floyd J. Cook, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed April 7, 1934.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.